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(H) Things to Do

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Summary
Evidence

(K) Witnesses ~~[illegible]~~ Moldenhauer

(L) Witnesses — Silverstein

(M) " — Langevin

(Mc) " — Stoddard

(N) — Chernick

(O) — Sargler
Denneau

(P)

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(Q) Memos — Polls

(R) — Search

(S) Video World Facti

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(S) Video World Facti

(T) Egan Obscenity Memos

(U) Obscenity Law - General

(V) [redacted] Obscenity - Law - Charter & Definition

(W) Legal Argument Search & Charter

(XYZ) LEgal - Charter Search & Free Speech

[redacted] — [redacted]

(66) [redacted] Legal - Charter / Obscenity / Free Speech - Corporate - Equality

(HH) [redacted] Summary - Facts

(II) Notes on the Books

(JJ) Cx - Murphey

(KK) [redacted]

(LL) General Notes

MM — Costs

McM — Trial Notes - CJC

NN - Trial Notes Students

(OO) - Argument

(1) — s.14 + Sch C 99201-1
infringe Charter sec 2(b) + 15

(2) — sec. 46 is unreasonable seizure
+ infringes sec 8

— ~~[illegible]~~
~~should be~~

(3) — actions of the Minister's agents in seizing this book ~~infringe Charter 2(b) + 15~~
because the ~~sec 2(b) + 15~~ 14/C/99201-1
not interpretted in a fashion
consistent with the charter
2b + 15

(4) — actions of Ministers Agent
infringe the Charter because
the seizure was not
reasonable

(1) Freedom of expression includes right to write/read/buy/sell on all subjects including sex

(2) Prima Facie Sec 14/C infringes free speech ~~Sec 14/Sec C prima facie infringes + must meet the rigorous test of Sec 1 as interpreted in Oakes~~

~~Any law which~~

(3) Furthermore Freedom of expression ~~store~~ must be available to all ~~group~~ in a fashion consistent with sec 15 ~~not~~ without discrimination

(4) In this case there is discrimination based on sex because men are denied same sex wife + women are not

(5) Further more there is discrim. based on sex preference which while not an enumerated ground is an appropriate basis in this case for claiming equal treatment

(6) In evaluating whether there has been discrimination Ct looks not just to purpose but also to effect. Effect includes disproportionate impact

(7) Where it is shown a statute or the application of statute infringes Charter right burden shifts to Crown to justify per Oakes
- to show a pressing & substantial interest in the issue & no other means dealing with the problem

(8) existing cases on obscenity 159 & vagueness don't cover the objections made in this case

(9) Crown must ~~show~~ justify
- system of censorship is justified where there are other CCC powers to deal with the problem
- customs censorship of everything not just distribution is justified
- taking away defense of public good is justified
- applying a test of obscenity that does not address harm
- ~~apply a double standard re explicitness of sex~~ information
- Censor without reasons

- singling out anal sex of all sex acts for special treatment

- discriminating against men & homosexuals by banning sex inform about same sex activity which is ~~a~~ ~~m~~ very common & very important to gay sex life & which is perfectly legal

this is so whether Gr position is ban outright or o.k. is tasteful
- has to be equality re explicitness
- justify why the books the same in all substantial ways esp. pic's should be different

(10) - ~~Search~~ Seizure by customs official
no prior judicial authorization
by some capable of acting judicially

Cases:

(1) Gordon + Gotch (Canada) Limited [1978] 2 F.C. 603 (F.C.A)

(2) Re North American News and Deputy Ministers of National Revenue for Customs and Excise (1973) 1 O.R. (2d) 200 (Ont. County Ct.).

(3) Towne Cinema Theatres Ltd. v. ~~Her Majesty~~ R [1985] 1 S.C.R. 494

(4) Richard Germain v. R [1985] 2 S.C.R. 240

(5) R. v. Dow Rankine Company Ltd. et al. (1983) 36 C.R. (3d) 154 (Ont. County Ct.).

(6) Re Prince Enrg. et al. and the Deputy Minister of National Revenue (1979) 52 CCC (2d) 44 (Ont. County Ct.).

(7) Luscher v. Deputy Minister Revenue Canada, Customs and Excise [1985] 1 F.C. 85 (F.C.A.)

(8) R. v. Popert (1981) 58 C.C.C. (2d) 505 (Ont. C.A.).

(9) R. v. Metro News Ltd. (1986) 56 O.R. (2d) 321 (Ont. C.A.)

(10) R. v. Red Hot Video Ltd. (1985) 18 CCC. (3d) 1 (B.C.C.A.)

(11) Hunter v. Southam [1984] 2 S.C.R. 145

(12) R. v. Jordan (1984) 11 C.C.C. (2d) 565 (B.C. C.A.).

(13) R. v. Simmons (1984) 45 O.R. (2d) 609 (~~Ont.~~ C.A.)

(14) Re Belgoma Transportation Ltd. and Director of Pollution Control (1985) 51 O.R. (2d) 509 (C.A.).

(14) Gershman Produce Company Ltd. v. Ex Motor Transport Board (1985) 17 C.R.R. 132 (Man. C.A.).

(15) Miller v. Canada (1986) 69 N.R. 1 (F.C.A).

(16) Reid + Young, The Charter, Administrative Search and Seizure and [1985] Queen's Law Journal 392.

(17) United States v. 12 200 ft. Reels of Super 8mm Film, 413 U.S. 123, (1972).

(18) U.S. v. Ortiz., 413 U.S. 139, (1973).

(19) U.S. v. Ramsey, 431 U.S. 606, (1973).

(20) Marcus v. Search Warrant of Property, 367 U.S. 718, (1961)

(21) Re McDonald and the Queen (1985) 51 O.R(2d) 745 (C.A.).

(22) R.v.R.L. (1986) 14 O.A.C. 318 (C.A.)

TRIAL
Book

Joy of Gay Sex

Charles Campbell

## Problems

Whether to open up extent of seizures as evidence of disproportion effect

in questions to Gerald

└ may be covered by Linda M.

---

non suit

immoral vs obscene

Costs see 24

---

no means rea in Customs Act offence

look up ~~Germain v Queen~~ 1985 2 CCC (3d) 289 (SCC)

Berdd's answer

who buys the book & why

- cases stress harm

get Costs case

Marchand

39 ACWS (2d) 406

(Mattlow) Hmst case

2nd BP Case

material on hand

- available het porn

- the box of seized stuff

Review

Open
Issues related to order of argument

Obscenity Law - see tab U.

- Law
  - attacks the application of the law not just the legislation

- Search
  - they don't know re opening package
  - how to ~~[illegible]~~ phrase search/seizure argument

- Who can say what are community standards

[ Require Disclosure
  Non-suit

PostFax

MONTREAL, H1J 2K9
CR213

## Customs Tariff Act

RSC 1970 C-41
sec 14

enabling
refers to amended Tariff
└ obscenity as defined sec 158(8)
└ this cuts out 158 (3) defense

## Customs Act
Sec 50 Appeal
per sec 46 47 & 48

Upon filing an appeal matter deemed an action in the Court

48 (18) · Costs

call David Bapper + tell Li this

MEMO

TO: CMC and file

FROM: Peter

RE: Glad Day Seizures and Post Office Regs

DATE: 07 Oct 86

Charlie:

Please find attached the relevant statutory and regulatory material regarding disposal of items seized by customs by the post office.

The statutory material is included primarily for completeness; the real meat is in the regs.

Reg. 1289 ("Prohibited Mail Regulations') is also included for completeness. Smut is not prohibited mail under the reg.

Re reg 1298 ("Undeliverable and Redirected Mail'), the starting point is section 9.and 10. For us, section 10 (1) (b) applies, thus directing us to section 15. The applicable subsection is 15 (1) (c) [formerly (d)], which states that mail sent from the United States shall be returned to the sender.

Also of relevence is section 18 of this reg. This section allows the postmaster general to destroy smut, but only if the smut has "no obvious value". Otherwise, it is to be handled pursuant to section 15, above.

Finally note the new paragraph 13(c) and (d), which allows the post office to dispose of smut "in a manner approved by the post office". Note, however, that section 13 applies only to material mailed within canada.

The bottom line is that the post office regs would require that the material be returned to the senders if undeliverable.

p.

A: CMC Staff: GAYSEX.MEM



Glad Day Books

v.

Deputy Minister of Revenue, Customs and Excise Division

Re: **The Joy of Gay Sex**

**Structure of the Appeal**

This is an appeal under s. 47 of the Customs Act, R.S.C. 1970, c. C-40, as amended.

The issue is whether **The Joy of Gay Sex** falls under item 99201-1 of Schedule "C" of the Customs Tariff Act, R.S.C. 1970, c. C-41, as amended by S.C. 1985 c. 37. Note that notwithstanding section 2 of that act, the definition contained in section 1 remains in force by virtue of S.C. 1986 c. . Pursuant to section 14 of the Customs Tariff Act, goods classified under schedule C may not be imported into Canada.

The applicant bookstore attempted to import **The Joy of Gay Sex** for resale. Pursuant to section 40 of the Canada Post Corporation Act, S.C. 1980-81, c. 54, the parcel containing the book was given to a customs inspector for examination. Pursuant to section 40(2) of that act, the parcel containing the books was opened. Pursuant to section 40(3), the customs law takes over at this point.

At the time the package was opened, the customs officer found the contents to be 'obscene' within the meaning of item 99201-1 of Schedule C of the Customs Tariff Act. As a result, the book was detained by the officer, pursuant to section 22(2) of the Customs Act.

Pursuant to section 46(1) of the Customs Act, the bookstore appealed the finding of the Customs officer to the deputy minister. The Deputy-Minister upheld the decision of the officer, pursuant to section 45(3) of the Customs Act.

Pursuant to section 47(1) of the Customs Act, the bookstore appealed the Deputy-Minister's decision. Pursuant to section 50 of the Customs Act, this appeal is to the District Court rather than to the Tariff Board, as is the norm under section 47(1).

It is submitted that the judge in this instance sits as a persona designata under the act, sitting in the same legal framework as

the Tariff Board. Specifically, it is submitted that the provisions for procedural rules contained in the regulations pursuant to the Federal Court Act have no application, as they concern the Federal Court Trial Division, which hears appeals under section 48 of the Customs Act. It is further submitted that the Rules Respecting Criminal Proceedings, SI/85-152 as amended have no application, as they concern proceedings in the Supreme Court. The Summary Conviction Appeal Rules SI/77-213 [Watson & McGowan p. 952] do not apply as there has been no conviction. Finally, it is submitted that the District Court Rules of Practice, passed pursuant to the Courts of Justice Act have no application, as this is not 'civil', and not a 'proceeding' within the meaning of R. 1.03 (22).

(1) D. Obscenity trial FIRST

This includes some Charter issues interpretting 159(8) & the Charter that ~~are~~ not ~~~~ based on striking down that section.

(2)

— Leave Charter Arguments for later being 4 5 & 6 on Notice of Appeal

— They are:

See over

## (3) Evidence to be admitted

- no reported prosecution admitted
- the book
  - the added preface
- the actual decision
- ~~Joy of Gay Sex~~ / Joy of Lesbian Sex } decided together

# Outline of Our Obscenity Defense

(Mixed Factual & Legal Propositions)

(1) Crown has burden of proving beyond reasonable doubt all element of the offense notwithstanding the fact this is nominally our appeal

(2) "Undue exploitation of sex" in Item 99201-1 must be interpretted in a manner consistant with the Charter of Rights & Freedoms

(3) The book the Joy of Gay Sex without or without the precautionary preface alluded to should be treated on equal basis as the books

The Joy of Sex
More Joy of Sex
The Joy of Lesbian Sex

← That equality arises by virtue of fact and law.

Fact - community would tolerate equal treatment of reputable sex education material

Law - free expression must be equally available to all - sec 2 & 15

(4) Evidence of Experts will be direct to the Author of demonstrate

(1) there is a need for sexual information in the gay community

~~(2) there is a need for information about gay personal, sex relations in our society generally~~

(3) the book is serious attempt Convey that information just & foremost to the gay community ~~& secondarily to the community generally~~

(4) Sex & the book is treated in a manner appropriate to that purpose without exploitation & certainly without undue exploitation

(4) gay sexual relations are common among a large minority of males & females

(5) anal sex relations are common in one form or another among all sexual preferences ~~although perhaps in differing degrees~~ more common - gay community

(6) J of S MJS & J of LS & J of GS are ~~roughly equ~~ more or less equivilant in terms of - their purposes - their appearance including illustrations, & their approach to sexual pleasure,

- non-exploitive attitude toward sexual relations • Fundamentally humanistic values

(7) The J of S was tried once ~~———~~ for obscenity and acquitted. The other three have never been tried (included J of GS until now)

All have been available for some time

J of S – published ——

M J of S – "

J of GS – published '77

J of LS "

(8) Gay sexual relations are legal
Sec 155-158

(9) LAW

test of "undue exploitation"

four parts
- internal necessity
- community standards of tolerance
- harm

Coles MacMillan

quote Times Square

considered all together

Town Cinema on harm

~~Sec 15 (8)~~ don't admit a dominant characteristic etc

Writing about sex per se is not exploitation of sex

the high point of the pure obscenity argument

(11) over

(12) Man & women should have equal right to buy books about same sex sexual relations where those books are roughly equivilant books about same sex relations

To hold otherwise would violate sec 15 & 2 (b) of the Charter

(11) prohibit ~~sex~~ anal sex
violates free speech
a common sex practice

(12)

Homosexuals should have the same right to buy books about male ~~their~~ sex relations as ~~heterosexuals~~ heterosexuals and lesbians do of their own where the books in question are roughly equivilant

Sec 15 should be interpretted to include sexual preference because in such circumstances similarly situated individuals have been treated unequally. based on sexual preference

① — decision infringes free ~~spe~~ expression & equality rights

② — free expression includes right sell & ~~[illegible]~~ to read

free expression must be available to all on equal basis without vidation of sec 15 unless justifiable by the Crown under sec 1

- sec 15 requires ~~[illegible]~~ no discrimination based on sex ~~or any other characteristic~~

~~leaving aside the question of other characteristics~~

discrimination consists of treating similarly situated individuals differently unless this can be justified under sec 1

the decision in question violates freedom of expression & equality by denying to the appellant & their male customers the right to sell book about & read about male same sex activity while females have ~~the~~ problems

~~such~~ right to read an equivalent book about female same sex activities & problems

discrimination based on other criteria than those enumerated is also prohibited where the discrimination is based on the immutable characteristics of a group

needs scholarly support

burden of proof on us

(A) that homosexuality immutable ~~[illegible]~~ - see Dr's evidence

(B) the decision based on discrim against gay males

that gay males denied right of freedom of expression equal to heterosexuals to read similar book about heterosexual sex activities & problems

# Conclusions Sought

(1) Cr hasn't proved beyond reasonable doubt [redacted] the exploitation of sex in this book

(2) Cr. hasn't proved bey. R.D.
the undue exploitation of sex

~~(3) the appellants have been discriminated~~

(3) The appellants Charter rights have been violated by the decision & policy of the Department

Charter Argument

Act + incorp. def:-

Obscenity (1) a prior infringe free speech because it is censorship
+Crown has burden

(2) ~~Wider~~ Wider than CCC

(3) not necessary we have CC

(4) ~~test doesn't~~
undue exploitation
community standards branch of
the test infringes free
speech as it does
does not pass sec 1
because no proven
harm

Search - sec 46 violates sec 8

# Charter Arguments

#4 – This is prior restraint + infringes 2(b), and cannot be justified

(A) It is prior restraint – [redacted]

[redacted] + a prior infringes 2(b)

see Schindler
OFAVAS

(B) it is infringement of free speech 2(b)

because obscenity def'n of "undue exploitation" violates sec 2(b)

+ can't pass sec 1 test

because "community standards" test – which is part of the test is in no way related to harm

because Customs Act bans all possession not just possession for resale

(#5) — A decision without reasons is not "prescribed by law"

(6) Customs Act s. 46
Customs Tariff Act s. 14 violate sec 8

because no requirement of reasonable grounds in statute

burden lies on Crown to show CCC sec 160 is insufficient

age
residence
business
kind of store — titles #

range — serious
know customers
bulletin bd

where is store

languages

other stores like it

visit other book stores — regularly

~~[illegible]~~ sell this book J of Gay Sex

starting when

- sales good/bad
  [is it wrapped in plastic]
- give us some sense what books sell well for comparison

constant
several hundred

still selling it
where do you get
why

?

- no stock
- distributor stopped supplying

~~[illegible]~~

estimate total sales

- several thousand hundreds a year

printing of revised text Apr 86

Seizure May '86

have Metro Police ever suggested
you remove it

where else seen it for sale
other languages
ever received complaints from
public about this book

how did the book here
in court get sent
to the Toronto store

- ~~[illegible]~~
— saw the customs list
but to our knowledge
no actual decision
sent it for a test
case

(could even tell about
two tries)

these book for purpose
for resale
* as precedent case

significance of Gay Sex
book in the community

- other seizures

a

recent up markedly

└ all reason say anal sex

Lesbian Sex

selling from when
sales good/bad

still selling

Joy of Sex

seen it for sale ?
where
since when

More Joy of Sex

do you sell it

---

AIDS warning

would only sell book
with warning

CX

- militant anti-censorship
  you have no bounds personally

- let crim law decide

- other "dirty" mag's in store

-
(A) - nothing store is obscene
I'll fight
but not ~~[illegible]~~ sell
illegal

- other books under appeal

- admit if asked
  central issue relates to anal sex

have you ~~[illegible]~~ sold racier

- yes

re titilating — funny no campy ?

vulgar — same as many men's books - not just gay
└ use word "fuck" carefully

advocacy — description for those interested

illegal activities — rimming, group sex, - degradation, bondage, washroom } — they go on + people want to know
— not the main pt of the book

pictures — informative in context
vaguely erotic
~~or not~~ depends on taste

Purpose

Motive irrelevant 159(5) but this doesn't apply

Purpose of Producer is relevant to community standard along with artistic merit community standard of tolerance

Times Square
1971 308 688 9CA.

- talk about "internal necessity"

Silverstein

age
b. where
education
career ——— counselling
writing
politicing

type of work in NYC
how long
type of clientele

- work outside NYC

- publications
  Gay Sex - translations

Professional Associations

What do you mean by politicy

- psychiatric issue homophobia

in touch with gay organizations all over the world

Are you familar with emotional troubles of gay men

How so

- counselly
* - talky with thousands in various countries

Do you know about sex practices of gay men

Differences between countries

---

- Do you know sales of the book
- Sales : Canada
- ever get complaints about book

compliments

What's the purpose of the book

historical need

- topics dealt with

College of Medicine, and Staff Psychologist, Lincoln Hospital.

4) Consulting Psychologist, The Carrier Foundation, N.J. (mental hospital).

5) Have taught psychology in the past at The City College, Rutgers University, Graduate School of Education, The City College.

6) Elementary school teacher, Larchmont, NY, 1959-1965.

## Publications

### Books

1) A Family Matter: A Parents' Guide to Homosexuality, McGraw-Hill, NY, 1977.

2) The Joy of Gay Sex (with Ed White), Crown, NY, 1977.

3) Man to Man: Gay Couples in America, William Morrow, NY, 1982.

4) Founding Editor, Journal of Homosexuality, a quarterly of scientific information in the social sciences regarding homosexuality.

## Member of the Following Professional Associations

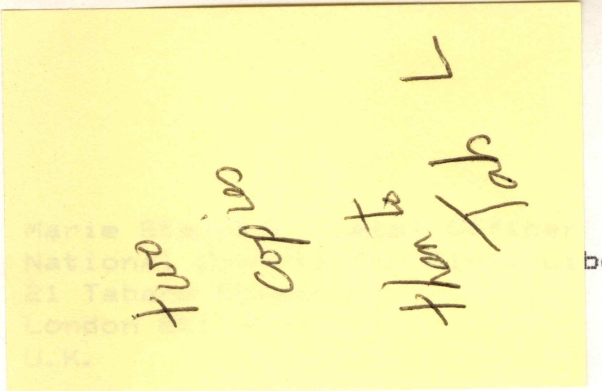
1) American Psychological Association

2) New York State Psychological Association

3) Association for the Advancement of Behavior Therapy

4) New York Society of Clinical Psychologists

Do you need anything else?



berties

Dear Ms Stauton,

I am in receipt of your letter dated May 28, responding to my offer to testify at the trial of my book The Joy of Gay Sex, written with Ed White. At first I had hoped to fly to London some time in August to speak personally with you, and to demonstrate that not all Americans are fearful of terrorists in the U.K. But my finances are not as plentiful as my enthusiasm. I will have to save my money for the trial in October. People in my position, the self-employed must figure not only the cost of a trip, but the loss in money from working. So let me at this point answer some of the questions raised in your letter.

Ed and I spent a great deal of time talking about the book before we started to write it. We wanted to know why we were writing it, who we were writing it for and what purpose it was to serve. We had been friends for many years before we began the project and therefore could speak quite frankly about these questions.

Both of us remembered our own youths as adolescents and our feelings about being gay. Edmund came from the midwest and I from NYC, but in some ways we had similar tales to tell. We both remembered the loneliness of those early years, a time when a young adolescent knows he is gay, but has no one to talk to about it, and no one from whom one can learn what gay people are like, what they do and the things to stay away from. Both of us could remember the other boys and men toward whom we were attracted to, but were afraid to even ask the simplest question. Books at the time were notorious for containing only depressing information, such as the depravity of homosexuality, the doom and gloom of what was an inevitable road to suicide. Later we learned that all novels of the period could have a gay character, as long as he committed suicide at the end of the book -- or the book wasn't published. The psychology books were even worse.

We wanted to write the kind of book we would have liked to have when we came out many years ago. The kind of book that would be the substitute for a personal friend who could teach, reassure and comfort the reader, who, again, we surmised as being a young person in the process of coming out. The book then, in our eyes, was to be a form of teaching/education of the gay world. It

is for that reason that so many non-sexual subjects are taken up. Most people are unaware of this fact. The truth is that there is far more copy devoted to non-sexual matter than sexual ones. While it was not possible for space reasons to treat every possible issue that a gay man must concern himself with, we covered as many as we could.

I should tell you more. Homosexuality, at least for many men in prior generations, was something you do in the dark, at night in one's home, in the shadows of a deserted street or a hallway. Such a life left its scars in lowered self-respect and depression. Ed and I wanted to make our contribution toward taking a gay life style out of the shadows and into the light of day, and therefore aid gay people everywhere. While it is a sex manual, its sexual content is not the major theme. After all, we hardly need any manuals to teach what has been practiced for thousands of years. To see it as only a sex manual is to trivialize the information in the book that is designed to help young gay men learn to be gay with responsibility.

We also felt strongly that information is valuable per se. We did not recommend sexual practices, but believed that a gay man should know the various practices available and then make decisions for themselves. That's why the book has a permissive tone.

I don't know how to respond to the question of convincing a jury that a book is not indecent or obscene. One of the problems is that I know so little of your laws (but wish you had a Bill of Rights). I have been told by an English friend that the customs operates under a separate law than the common law, and that you cannot use books actually published in England as evidence that an imported book is not obscene. I am also told that such an English published work can be taken out of the country and then seized when it is brought back in. A tough set of laws, indeed.

In the United States, feminists try (I think unsuccessfully) to distinguish between erotism and obscenity. Perhaps there is something useful there for us. Erotism is the honest display of human sexual contact that is intended to highlight the pleasure of consensual sexuality. Obscenity, on the other hand, is motivated by the desire to exploit sexual roles, i.e. male/female, usually by graphically displaying a woman in an inferior status to a man.

The prose in Joy of Gay Sex was not written to titillate the reader. It was not meant to be a sexual turn on. It was written in a straightforward style to be

informative. It was knowledge that we were trying to disseminate. It was not our intention to write a, shall we say, "workbook" for practicing masturbation or increasing the sexual excitement of the reader. We certainly hoped the reader would feel good about being gay, but didn't try to write "sexy" prose. The difference between this writing style and the style of sex books should be obvious to any reader.

I need to also note that I am told that the Joy of Lesbian Sex was not seized. If that it true, must not the Crown state why a picture of fellatio is obscene, but one of cunnilingus is not?

There is, of course, a long history to the presentation of male/male sexual contact, beginning with cave drawings, to say nothing of the gay kings of England -- in my last trip to London I found Edward I and Edward III in the same room at the Abbey. I asked the guide why Edward II wasn't there. He gave no reply and promptly walked out of the room. Never mind. We visited Edward II a week earlier. He's in a church in Gloucester.

Do I remember that homosexuality is not illegal in the U.K? If so, then why should a book on the subject be illegal? If it is not illegal for two men to have sex together in the privacy of their rooms, why should a book talking about any two men be judged obscene? But then, you've probably thought of that.

Are you aware that the publisher of the book is English? They are Mitchell-Beazley in London. They are the packagers of the book and sold it to the Americans -- Crown Publishers in NYC. I doubt they will be of much help, but you can try. James Mitchell is the publisher, and he also did the Joy of Gay and More Joy of Sex. Are they admitted to U.K?

I have testified at quite a number of trials here in the USA. Not about books, but often called as an expert witness in sex cases. I'm quite good on the stand. Let me know what else you would like at this point.

Sincerely yours,

Charles Silverstein, Ph.D.

PostFx

MONTREAL, H1J 2K9
CR213

Langevin

age
br
education
professional history
Professional Associates

Intl Acad for Sex Research by invite only

— counsulting to Bd
— position

- books published
- articles published

what portion — deals with

2 books

# 507

- ~~role in sex education~~ Professional Assoc.
- Describe the Clarke
- nature of day-to-day work
  - What portion of scholarly work deals with sex practices

prior testimony
describe work in ~~human~~ sex eduction
- have you done work in area of sexual practices — yes gay straight normal abnormal preference

work in sex education
role in sex therephy
- ~~do you treat homosexualit~~

Expert in
- sex practices comm in Canada
- sex treatment related to sex matter
- sex education especially homosexuality
- ~~gender preference~~

- type of clients - the Clarke
  - see very few homosexuals since '69

# Sex Practices

- what portion of males in Canada are homosexual
  - once
  - regular

- what sex activities

- do other sex groups have anal sex ~~abt~~

---

- any significant difference to the psychology of sexual pleasure
  - gay-straight
  - anal / other

~~At hosp~~

~~Describe the Clas~~

At the hospital

do you treat homosexuality

do you treat persons with
interest in anal sex

~~In your area of expertise~~

~~is it com~~

Are you familar with
attitudes of ~~hospitals~~
dr's o psychologists
generally about sexual
therapy

Is there any significant
body of learned opinion that
calls for or treats persons
interested in or practicing
anal sex. homosexuality

no rational justifiable reason for distinguishing anal sex from other

because physiologically / psychologically } the same

~~Common to~~ all sex groups done by

Charter free speech

pure obscenity

of greatest interest to gay

- Gay
  more on psychology

- pic's reflect home practices - masturb - anal
  nudes - 36% don't ~~[illegible]~~ Say anything

---

Joy of Sex

Joy of Gay Sex - longest disease
- historical/rights - 5 < myths

113 topics
41 on psychological
accurately reflect life style
sound useful
layman
Valuable to young people

sex practices - general descriptive
no advocation
proper warnings
14 on anal sex

Treating Homosexuality at Hospital general

Treating people interested in anal sex

Is there a need for book about
sex for sale to the
general pop.

Any difference in that need
gay & straight

-gay-
coming out
crisis

Seen the book Joy of Gay

Seen the other 2

- Overall impression
  Is Joy a appropriate
  book for sex education

Would you use it ——— Yes sex education

~~Does it~~ ~~[illegible]~~ Would people object to content or style

Is content good advise

- dated slightly as all sex books are

Are illustrations appropriate

Is the book exploitive of sex

NO

- true to its purpose as sex education

focusing on sex content for its own sake
voyeurism

## Problem Areas

- Orgy p. 144
  T-Rooms
- illustrations

---

"advocates anal sex" — not illegal

└ Langevin — not attempting to deny that this is pleasurable
- relieve anxiety etc

[probably wouldn't cause someone to become gay

- negative implication of being gay
  - do you try to change or cure
  - should society try to change or cure

- experience with gay & straight

# Questions

- Is there a need for this book - sex manual
  - why
  - Does it have merit as sex manual
  - integrity of the book
- In addressing anxiety about sex are gays different than straights
- AIDS
  - what is their position
  - to be avoided
  - or precautions
  - standards can change
  - when does risk of disease fit in obscenity definition - US SC case?
- Would it encourage illegal activity
- Are ~~pics~~ illustration appropriate
  - are they superfluous
- illegal sexual activities
  - group sex — does it advocate fucky

need to be informed

yes + sex sex guide

## Langevin

- don't ~~—~~ treat homosexuality per se
- transition problem refer to gay community organization
- "coming out" problems
- an "anomaly" - like being left handed
- 40% of men ——
- bi-sexuals are the one disturbed
  advise them to shed hypocracy
- sexual preferences are set
  ~~—~~ doesn't volunteer biological vs social
- promotes tolerance in school progammes
-

---

expert on - sex practices of Canadians
- 40% of men
- lesbian
- who does anal sex

- sex violence

- agrees with need for sex manual to normalize sex transition
- would insist on equal treatment of sex groups
  re sex manuals
  immediately pt's out - hetero sexual anal intercourse
  - other sexually transmitted diseases

- would vingorously deny book promotes sex violence
  probably no influence on sex choice
  good to be advised on sex practices

- not troubled by group sex
  didn't know that group sex illegal

- anal sex not to most common gay sex activity
  - can be pleasurable

- "titilaty" - all sex manuals are
  - my observation corresponds to his lab

description is of normal sex practices in the groups addressed

# Anal Intercourse

homo regularly into anal — 20% of type
most common is oral-genital

- hetero -
1@week regularly — 2%
~~[illegible]~~ — 43%+
tried it — 50% find some degree of stimulation

Kinsey
16% try oral sex
17% try anal intercourse 12-14 yr

Overall
37% of male pop tried
44% of adolescents try it
50% educated group

8% exclusively for 3 years 15-65

4% thru their lives

- getting down the Act itself
  no significant difference
  practices similar

response preference

- overall satisfaction gay or straight

psychologically the same response

psychological factors same

Comparison

## homophobia

- no mention of frequency on homophobia
- negative attitudes from those
  - no contact
  - perceive other as neg
  - from areas of negative views
    - conservative religions
    - restricted attitude to sex roles
    - authitarian personalities
    - anti-minorities

Canada more liberal generally

- 1/2 of heterosexuals
  has manual anal foreplay

---

Content

60 pic's -

mostly - nudes 25 — pontalist de-emphasize genital

anal - 23

mast - 20

oral genital 12

kissing 7%

non sexual 1

Joy

2 x the pic's

36% show vaginal intercourse

20% nudes

9% - anal

8 sexual anomalies

- fisting
- fetishism
- S-M

- condemns

not supportive of practices

attitude - you'll try it

this is how

negative tone about bad stuff

---

Joy of Sex more here's how to do

Gay more how to do it

---

Gay a guide to subculture

condemning deviant practices

Anal is about 10%

## Query

L succession right to distribution

- would they continue
- problems Joy of Lesbi - Sex

coach him on substantive issue
- they're all the same
- huge demand
- in context no exploitation

Stoddard

position is the Presidet of General Dist.

- ~~General Distributing~~

- Describe it briefly

- Has the company any knowledge of Joy of Gay Sex

What
- when distributing is it exclusive

Why stop

Who has rights now

From when

~~Circulation~~
Distribution figures

Would this be total sales

What locale for distribution

Are you distributor /or

Joy of Sex

More " " Sex

Joy of Lesbian Sex

Distribution Figures

Ever charged

Convictions

# Dr Chernick ← 10:10 to Island

## Qualifications

- Bs
- School
- Graduated
- Graduate Work
  Testified at Show Me + recent one Love Craft
- Where practice
  What type ① What is purpose
  ③ What type of clients - how many ⑤ straight - gay
  - What other activities — sex education
    Where — schools across country
    Who
    ~~How~~ How often — across Canada & N.A.
    How many
    Discussions Questions
  Professional associations

② briefly what do you do

testify in court

---

⑥ when you see gay patients — No
are you trying to change sex orientation

Expert :-

- sex therapy
- sex education
- community attitude toward sex education

education vs therapy

different uses of
books & materials

---

Is there a need
for books about
sex & sex related
issues

---

Is there a useful role
role for Gay

- Have you ~~read~~ Joy of Gay Sex

- When

- How would you describe it

pop psychology
sex reference

- Is it a useful book

by all means

~~For whom~~ mostly gay men

Is it a competent discussion of issues

yes except - ?

~~Who would be most~~

Would you use it in sex education

- give people choice of books
- might say language is a little ~~for men~~ vulgar if I thought this was a sensitive person

~~Would you use it in sex education~~

~~Is need for info on homosexuality any different than straight~~

~~isolation~~

~~① how many people ~ therapy~~

③ use books in therapy

- Your book

---

- difference therapy & education
  - (B) objectives
  - (A) need
- What are issues ~ sex education ← teenagers, unsatisfied sex lives, sex orientation
- in public education do issues of sexual orientation come up — regularly? does public disapprove
- ~~the~~ the book useful ~ sex education — yes more so than therapy
  - What is the need — many sex problems can be sorted out with information & don't need therapy
  - ~~Is it appropriate sex education~~
  - Is need different gay & straight

Is book exploitive of sex

Are illustrations appropriate — many more explicit

Are they erotic — mostly no

~~erotic ok.~~ — erotic is ok. in its place

~~[illegible]~~

Does book ~~[illegible]~~ exploit degrading sex ~~[illegible]~~ activities

Anal Sex

Book deals with anal sex
~~friends says he advocates~~

Does that trouble you — No

Ever discuss that with patients or in sex education groups — yes

Do you advocate it — — whatever is natural

Every counsel on it

✓ Speaking as physician what is clinical difference — — great variety of reactions in both
— overall the same

Any differences in your attitude whether penetration is penis implement finger

Do patients ever object to subject of anal sex — - small minority yes
- majority curious
- gays interested

Do people in sex education groups object to subject

From your discussions with patients & public in sex education could you estimate is anal intercourse common form of sexual relations

- intercourse vs pleasuring
- great variety
- common gays

Identify

Basic opinion

~~[illegible]~~ Comparison

---

Gay

specific

— ~~[illegible] book [illegible]~~

~~is book~~

— purpose is information

— purient purpose

purient effect

---

would

~~[illegible]~~ ~~you~~ the people you deal with be comfortable the explicitness

- any one who reads it wants it

Seiglen

Age
Education
Bussness

- Publisher
Tala Books serious + nonfiction

Tell us about it

national
some gay authors
- sell to all outlets

✓ To whom do you sell
Do you consider books for publication - How many
# What are factors?

Quality
Demand

Associated with CPA
What is it
What does it do
Your position

President

What does it entail

— being knowledgeable about what public wants
~~— go to bookstores~~
what public doesn't want

What does that mean in practical terms

— watch all book sale issues to publishers

Have you had occassion to discuss public's tolerance of publishing issues related to gay sexuality

yes - specific fights
lots of general talk across the country
— read watch the press on the issue

Any other jobs

consultant

What

Manitoba jobs

~~Distinguish publish + distribute~~

Qualify as expert –

① – gay literature
② – publishing – Canada
③ – public tolerance of gay literature

Expert in book publishing in Canada

~~In your trade~~

In book business what would be best seller in non-fiction area

cumulative yearly

Evidence of sales of
- 25,000 + since '77

what does that say

---

distinguish publish & distributes

---

Have you read the Joy of ~~Gay~~ Sex Yes

If you had the chance to become the distributor would you do so

Why

- important book classic
- Fits my list
- good sales

In your opinion would the publisher-distributors want it

Do you feel there would be any significant public objection to the book

Some but not significant

How so - homosexuality still has some controversy Wouldn't there be objections?

① not so far

③ same as Joy of Sex & public would be even handed

② good book

You say it's a good book
Speaky as publisher

Why

- states purpose
- valid purpose
- deals with sex in non-exploitive fashion
- illustrations follow theme
- well written as accessible book for popular market

- deals with sensitive themes well

Book deals with anal sex
In your opinion would there be significant public objection to that

Some but not significant

- my books deal with that
- overall little controversy
- one time complaint made decisive public reaction in support

† none since

Have you read
Joy of Sex
More Joy of Sex
Joy of Lesbian Sex

If you have chance to distribute those books would you

Are thy good book from pt of view of publisher

Why say that?

- same as above

How would you compare the books

- same style
~~purpose~~ each discusses their sex
overall equivilant

some ~~the~~ tougher language

What do you mean tougher language

'Fuck'

Does this affect ~~In your~~ opinion as publisher that the book has merit

- not significant typical of male and/or gay audience

---

AIDS

UNIVERSITY COLLEGE
UNIVERSITY OF TORONTO
TORONTO, CANADA
M5S 1A1

30 December 1986

MEMO TO: Charlie Campbell
FROM: David Rayside
RE: Public Opinion on Censorship and Homosexuality

There are three points I could make with respect to the state of public opinion on questions dealing with censorship and homosexuality, all of which point to the difficulty of coming to an unequivocal view of community standards.

1. On a great many issues, public opinion is extremely volatile, and the less central to the daily lives of ordinary people a particular issue is, the more volatile opinions would be. In such cases, slight variations in wording can produce significant differences in attitude, for the respondent looks for cues in the question about what the appropriate stand might be. People will also pick up cues about what beliefs are appropriate from institutional authorities such as church leaders, police officials, and political leaders, and if those cues are mixed a considerable amount of attitudinal variation will result.

2. There is <u>systematic</u> variation in public attitudes (as distinct from more random variation) on a couple of crucial dimensions. Control or regulation of either sexual behaviour or of imagery is more widely opposed as it involves a limitation of individual choice or an intrusion into private space. Control is also more widely opposed if it entails the use of more forceful measures, such as prosecution (as distinct from more routine administrative regulation), I will illustrate with a number of "Agree/Disagree" items posed in a single British survey in 1982:

"There should be no censhorship, on sexual grounds, of plays and films" Agree 22%; Disagree 70%

"The authorities should stop interfering and allow ordinary people

to decide what is fit for them to see and read, and what is not"

Agree 56%; Disagree 34%

"Anyone over 16 should be able to see any film or publication about sex so long as there is a clear warning of its contents"

Agree 70%; Disagree 24%

"The law should ban films and publications which contain explicit descriptions or illustrations of sexual acts"

Agree 48%; Disagree 40%

"Pornography should be available to those people who want it"

Agree 66%; Disagree 24%

And from a 1978 Week-end Magazine poll of Canadians:

"Do you favour government censorship of pornography?"

Favour 62%; Oppose 35%

"Should the government prosecute those who sell or show pornography?"

Yes 49%; No 47%

"Should the government prosecute people for possession of pornography?

Yes 17%; No 80%

The most recent Gallup poll dealing with censorship produced the following results:

"About a year ago, the Fraser Report on Prostitution and Pornography recommended a ban on all pornography that involved children, violence or that was degrading. But it was suggested the sale or distribution to adults, of explicit pornography not involving children, violence or degradation, should be allowed. Do you agree with this or not?

1986 results: Yes, agree 50%; No, disagree 46%

1985 results: 57% 36%

Because the question is a complex one, the results are difficult to interprete. It could be the case, for example, that a number of respondents were thinking primarily of the preamble in saying yes or no, rather than the second sentance.

What the evidence suggests is that Canadians are quite seriously divided on the question of censorship, and opinions vary considerable according to what specifically is being asked and according to what cues are received in the question. Although there is close to or perhaps more than 50% support for censorship in the abstract at some times, questions which suggest an infringement on the right to see or buy what one wants ellicit stronger negative responses.

3. There is a difference between public approval or disapproval of a particular act or category of persons on moral grounds and their preparedness to tolerate acts or categories of persons and grant them certain rights. For example, when asked if homosexual acts are right or wrong, about two-thirds of Canadians and Britons consider them wrong,

and about three-quarters of Americans think them wrong. In all three countries, the extent of moral disapproval seems to be strikingly persistent. But on the other hand, a clear majority in each country, approaching two-thirds of the population, approves the granting of equality rights to homosexuals. There are a variety of reasons for the co-existence of these distinct attitude patterns. One has to do with the widespread view that morality cannot be legislated, and that the reach of the law ought to be limited. Another reason has to do with the growing recognition of pluralism in our society, and an apparent growth in the view that differences between people which do not impinge upon others can be tolerated even if not fully understood or condoned. Whatever the reasons, it is clear that we cannot generalize from moral condemnation of a particular group or to attitudes having to do with regulation or with equality rights. A great many citizens are accustomed to differentiating between what they like or dislike and what they will tolerate.

Times Square 4 CCC(2d) 229

Dale surveys not representative

inclined to say no poll evidence is admissable unless those whose views are tested are called

or as basis of experts opinion
contrary to Lupien 1970 SCR 263
Dietrich 1970 30R 725

Abby 1982 2 SCR 24

MacLean (trial) 63 CCC (2d)
what to ask community standards

(Appeal) 1 CCC (3d) 412

Jurisdiction

- raising unlawful seizure at trial level

this is a seizure
~~they~~ clients asked for search

is the section nevertheless unlawful

- should we include reference to Post Office Act sec 40
would be proper
except they asked for the opening

Schindler v Dept Min Nat Rev
for Cust. & Excise

8 CER 89

opony a letter is not a search?
not unreasonable search

Re Allen v City of Hamilton
55 OR (2d) 387

— our argument has to attack the section as in NS case

— to attack on facts is weak

└ we'd be saying the list isn't a good enough basis for search

but cases say cops can act on unidentified tips

see R v DeBot

Lawyers Weekly
Dec 19/86 p. 11

Seizure – Def'n

Thomson Newspapers v Dir of Inv. & Res.

26 DLR(4th) 507

– do we say it's search or seizure

~~→~~ does it defeat our allegation of seizure if we can appeal & get stuff back

↳ reasonableness of procedures in issue

– no rt. to make representation predetermined decision based on the list

Does ~~this~~ sec 8 apply at the Boarder

~~Is this case right~~

Re Becker 148 DLR(3d) 539

Montreal Litho 1983 8 CRR 299

purport to say sec 8 protects people not goods ∴ doesn't apply to customs seizures of goods

* R v Jordan 11 CCC(3d) 565

└ reasonable search at the border

test of reasonableness is lower at border

- there is a test

Crown doesn't have to prove ~~must~~ much of a basis for suspicion

Re Schnyder

12 CRR 270

customs search of postal package not unreasonable

distinguish "postal package"

Re Jagodic

- do people/goods crossing the board have sec 8 rights

  - do US cases say no rights?

does Lushen say there are rights?

- analyzed as privacy rt, per HvS, how does that fly in boarder crossing

~~- what is the sec 8 analysis of sec 8 at boarder search/seizure~~

the section says reasonable

Hunter v Southam 14 CCC (3d) 97

prior authorization

upon oath of reasonable & probable grounds that an offence has been committed

to person at minimum capable of acting judicially

Almeida-Sanchez v US 413 US 266
US v Ramsey 431 US 606
Torres v Puerto Rico 442 US 465

warrantless search of baggage doesn't violate the 4th

- get me cases on disclosure
- check on Notice

## Search

Grounds for attack

{ their procedures - no prior authorization by someone capable of acting judicially

We need evidence of the guidelines + procedure

{ the Act + Reg's speak for themselves

Reply

o.k. to open all incoming parcels

list o.k. system for dealing with volume of titles

- the list is categorical } on anal sex guidelines

do we need evidence on the use of guidelines

Objections

└ irrelevant - whether other book are obscene is irrelevant

if regulation itself is challenged
might make the whole literature relevant
only attacking the application of law to this book
on free speech
equality

they say
if equality to be applied ...

we refer to 3 Joy books

Re attack on law of search
justify the list system
by volume of stuff coming in

**R. v. Williams**

Ontario District Court, November 1985.

Issues and findings:

Person asked by customs inspector to submit to body search is detained, and has right to counsel.

Person directed to submit to body search not given chance to appear before judicial officer. Violation of section 8 (search and seizure) of Charter.

**R. v. Jagodic and Vajagic**

N.S.S.C.-T.D.; April 1985.

Facts: drug trial. Evidence obtained by border search of automobile pursuant to Customs Act. Issue was whether this search in contravention of s. 8 (search/seizure) of the Charter.

Issues/Findings:

s. 133 of Customs Act in violation of s. 8 of Charter, as ground for search inadequate, i.e. less than the required "reasonable and probable grounds established upon oath"

presumption that warrantless search unreasonable, but presumption met here.

History: decision of first instance. No appeal of which we are aware.

**R. v. Jordan**

B.C.C.A.; February 1984

Facts: body search of person entering Canada. Officers acting without prior authorization, on information provided by police. Issue was whether s. 8 (search and seizure) of the Charter had been infringed.

Holdings:

S. 8 not infringed.

Standard of reasonableness much lower regarding border searches than other searches. Reasonableness provisions satisfied if officers acting on information provided by police. No need to prove source of information or basis of belief of police.

History: accused convicted at trial. Appeal refused.

**Hunter v. Southam Inc.**

S.C.C.; September, 1984.

Issues and findings:

The issue under section 8 (search and seizure) of the charter is not the rationality of a search in terms of the attainment of a legitimate government objective, but rather the reasonableness of the search. Includes an assessment of whether the search is the least intrusive means possible of effecting the end.

The norm for a reasonable search includes prior authorization by person capable of acting judicially.

"Credibly-based probability" must have replaced mere suspicion for a reasonable search. Here, 'reasonable and probable grounds' were required by the court to be shown that there is evidence to be found at the place of the search.

PostFx

MONTREAL, H1J 2K9
CR213

1. Corporations

- not entitled to rely on s. 15 rights - must be an individual

Smith, Kline Also says a corporation does not ordinarily have standing to bring a declamatory action alleging an infringement of this section.

2. "Unenumerated Grounds" Criteria

- both Smith, Kline and Kask v. Shimizu say s. 15 (1) is broad enough to cover any form of discrimination, whether or not it is based on one of the grounds specifically mentioned in the subsection. Kask says the criteria must be whether the unenumerated ground upon which the discrimination is based undermines the "essential" on "underlying" values of a democratic society. Smith, Kline is more forgiving. A non-enumerated discrimination is not judged in light of tests for s. 1 (b) but rather it is consistent with the purpose of s. 15 (1). The test is

- the ends must be among those broadly legitimate for government

- the means must be rationally to the achievement of those

The presumption is in favour of governments rational basis for distinguishing these people from the rest of society. Test is like an Oakes/Big M proportionality test.

Smith, Kline wants to avoid clogging up the courts with a review of every new piece of legislation under s. 1 (1). Kask rejects this both in fact and in principle.

3. "Similarly Situated" Criteria

There is no precise or exact test for the phrase "similarly situated". The courts seem to consider it almost a factual matter of reasonable interpretation. The courts have, on occasion, considered such groups to be narrowly considered - only those school boards which break legitimate by-laws (Re Weinstein). The more usual interpretations is that of an identifiable class - "those who substantially belong to the same class and are similarly circumstanced" - Addy v. The Queen.

The court seems to consider people "similarly situated" if they all are going to be banned by some type of discrimination - "legislation that singles our a person or a class of persons for differential simply because they are members of that class". - Re British Columbia and Yukon Territory.

Once a group is declared as "similarly situated", the group must be similarly treated as those who are similarly situated. The question is, "whether the impugned distinction is reasonable or fair, having regard to the purposes and aims and its effect on persons adversely affected. The test is objective. The ultimate question is whether a fair-minded person, weighing the purposes of legislation against its effect on the individuals adversely affected, and giving due weight to the right of the legislature to pass laws for the good of all, would conclude that the legislative means adopted are unreasonable or unfair". - Re Andrews and Law Society of British Columbia et al, (1986) 27 .L.R. (4th) 600 (B.C.C.A.)

4. Human Rights Code

Only Quebec and Ontario have sexual orientation protection directly in their codes. It should be noted that such codes are subject to Charter review (Re Blainey), and that such codes deal with private activity, not directly government action (Re Blainey).

Here, best to catogorize "similarly situated" group as being people who want to find out information about sex, or, at least, gay men wanting to find out information about sex (i.e. keep similarly situated group as broad as possible).

Similarly Situated

- Re Weinstein et al and Minister of Education for B.C. (1985) 20 D.L.R. (4th) 609

- persons who are similarly situated

- assumed, without deciding, that school boards had rights

- narrow reading of similarly situated: boards that didn't treat by-laws

-Addy v. The Queen right of Canada (1985) 22 D.L.R. (4th) 52 F.C.T.D.

- court must compare the treatment complained of with that of others who substantially belong to the same class and are similarly circumstanced

- Re British Columbia and Yukon Territory Building and Construction Trades Council et al and A.G. of B.C. et al (1985) 22 D.L.R. (4th) 540

- A distinction (in treatment) will violate the principle of equality if it has no objective and reasonabl justification. Legislation that is discriminatory in the sense meant by this subsection is legislation that singles out a person or class of persons for differential treatment simply because they are members of that class.

Re Gerol and A.G. of Canada [1986] 1 C.T.C. 75 (H.C.J. of Ont.)

described Discrimination within the meaning of this subsection can be as the use of a distinction based on a prohibited ground which results in a nullification of rights and which a detrimental effect on the complainant. Distinctions which do not create adverse results are not themselve discrimations.

Re Blainey and Ontario Housing Assoc. et al, (1986) 26 D.L.R. (4th) 728 (Ont. C.A.) leave to appeal to S.C.C. refused June 26, 1986.

- everyone doesn't have to be treated in precisely the same manner

Its purpose is to require that those who are similarly situated be similarly treated, and the interests of true equality may well require differentiation in treatment.

Corporations

- not entitled

Re Surety Credit Union and (1985) B.C.S.C.

M v. Medicine Hat, (1985) 67 A.R. 11 (Q.B.)

Smith, Kline & French Laboratories Ltd. et al v. A.G. of Canada, (1985) 24 D.L.R. (4th) 321 (F.C.T.D.)

- Also says a corporation does not ordinarily to bring a declamatory action alleging an infringement of this subsection.

Parkdale Hotel Ltd. v. A.G. of Canada, (1980) 27 D.L.R. (4th) 19 F.C.T.D.

Re Homemade Winecrafts (Canada) Ltd. and A.G. of B.C., (1986) 26 D.L.R. (4th) B.C.S.C.

The Obscenity Arguement

1. The current test for obscenity, as delineated in s. 159 (8) of the Criminal Code of Canada, states that any publication which has an undue exploitation of sex as a dominant characteristic will be deemed to be obscene.

2. Judicial interpretation of this section has focused on three approaches to determine "undue exploitation". These approaches are:

   i) internal necessity of the work;
   ii) community standard of tolerance;
   iii) harm to some members of society, and thus to society as a whole.

   Towne Cinema Theatres Ltd. v. R. [1985], 1 S.C.R. 494

3. In determining the internal necessity of a work, consideration must be given both to the emphasis required for a serious treatment of the subject and to a consideration of the work as a whole.

   Brodie v. The Queen [1962], S.C.R. 681 quoted with approval on this point by Dickson, C.J.C. in Towne Cinema, supra

4. The community standard of tolerance is an objective test based on a national Canadian standard of contemporary tolerance.

   > "The cases all emphasize that it is a standard of tolerance, not taste, that is relevant. What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it."

   Dickson, C.J.C. in Towne Cinema, supra, p. 508

5. As to consideration of harm, the original test developed in R. v. Hicklin (1868) L.R. 3 Q.B. 360 and cited in Brodie, supra, was:

> "Whether the tendancy of the matter changed as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." (at p. 141, 37 C.R. 120)

Dickson, C.J.C. refused to apply this strict in Towne Cinema, supra, and suggested that harm would be manifested in the manner in which individuals were portrayed in the work.

> "No one should be subject to the degradation and humiliation i in publications which link sex with violence, cruelty and other forms of dehumanizing treatment....Even if certain sex related materials were found to be within the standard of tolerance of the community, it would still be necessary to ensure that they were not "undue" in some other sense, for example in the sense that they portray persons in a degrading manner as objects of violence, cruelty or other forms of dehumanizing treatment."

Dickson, C.J.C. in Towne Cinema, supra, at p. 505

6. The Joy of Gay Sex is a reputable book pertaining to gay sex practices, and the discussion and illustrations pertaining to sex are an integral part of the work.

R. v. MacMillan Co., (1977) 31 C.C.C. (2d) 286 (Ont.Co.Ct.)

R. v. Coles Book Stores Ltd. [1974], 6 W.W.R. 404 (Alta.S.C.)

7. The "undue exploitation of sex" must be interpreted in light of the guarantees protected in the Charter of Rights and Freedoms Act for the equality of sex in s. 15. Therefore, there is no basis to distinguish between male or female sex practices in determining "undue exploitation".

8. Further, "undue exploitation" must be interpreted in light of Charter guarantees for equality in sexual preference. There is, therefore, no rational basis to consider a sexual act more obscene if performed by those of the same sex, as in Re Priape Engr et al and the Deputy Minister of National Revenue, (1979) 52 C.C.C. (2d) 44 (Que.Superior Court Crim.Div.).

9. The fact that an act possibly prohibited by the Criminal Code is mentioned in a work is not ipso facto proof of obscenity, and is only one further factor to be considered in determination of an "undue exploitation of sex".

R. v. MacMillan, supra

10. Community standards of tolerance accepts equal rights for gay individuals.

Ontario Human Rights Code

11. The Joy of Gay Sex is in essence the same as books such as The Joy of Sex and The Joy of Lesbian Sex. As these books have not been successfully prosecuted, neither can The Joy of Gay Sex be considered to violate community standards.

R. v. Coles Book Stores, supra

12. The prohibition of The Joy of Gay Sex would be an infringement of the rights protected in s. 2 (b) of the Charter. Further, it is not a reasonable limitation as described in s. 1 of the Charter because an individual could not with tolerable certainly anticipate the exclusions of work based on s. 159 (8).

Luschen v. Deputy Minister, Revenue Canada, Customs and Excise, 45 C.R. (3d) 81 (Fed.C.A.) (1985)

Charter Argument on Obscenity

1. The protection afforded by s. 15 (1) of the Charter is broad enough to cover any form of discrimination, whether or not it is based on one of the enumerated grounds.

   Smith, Kline & French Laboratories Ltd. et al v. A.G. of Canada, (1985) 24 D.L.R. (4th) 321 (F.C.T.D.)

   Kask v. Shimizu et al, (1986) 28 D.L.R. (4th) 64 (Alta.Q.B.)

2. Those individuals who seek to read similar sex manuals make up a class "similarly situated".

   > "...those who substantially belong to the same class and are similarly circumstanced."

   Addy v. The Queen, (1985) 22 D.L.R. (4th) 52 (F.T.C.D.)

3. The Joy of Gay Sex, The Joy of Lesbian Sex, The Joy of Sex and More Joy of Sex are similar sex manuals.

4. The right to read educative sex manuals is a right protected by the freedom of expression.

   Section 2 (b) of the Charter

5. The right to freedom of expression is limited by the "reasonable limits" set out in s. 1 of the Charter.

6. Any test to determine these "reasonable limits" must be uniformly applied.

7. The test for obscenity set out in s. 159 (8) of the Criminal Code, that material not have "an undue exploitation of sex", must be uniformly applied to all material.

8. To hold that depictions of "same-sex sex" is more "undue exploitation of sex" than depictions of "different-sex sex" is to discriminate against "same-sex sex".

9. Discrimination based on sexual practices on orientation discriminates against those who partake in those sexual practices on who have that sexual orientation. Thus, this approach "singles out a class of persons for differential treatment simply because they are members of that class".

   Test in Re British Columbia and Yukon Territory Building and Construction Trades Council et al and A.G. of B.C. et al, (1985) 22 D.L.R. (4th) 540 (B.C.S.C.)

10. This discrimination is not reasonable on fair, as it purposefully seeks to suppress sexual information simply because of the nature of that information, while similar sexual information is available to similar groups. Such discrimination would be otherwise to a fair-minded person, weighing the purpose of the discrimination against its effect on the individuals adversely affected.

    Test in Re Andrews and Law Society of B.C. et al, (1986) 27 D.L.R. (4th) 600 (B.C.C.A.)

11. Such discrimination undermines the essential and underlying values of a fair and democratic society, namely access to basic information fundamental to those similar situated.

    Test in Kask v. Shimizu, supra

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**Re Andrews and Law Soc. of B.C.**

B.C.C.A.; May, 1986

Facts: B.C. Barristers and Solicitors Act required that persons admitted to Bar must be Canadian citizen. Applicant was landed immigrant and permanent resident, married to Canadian, and intended to become Canadian as soon as eligible. Challenged provision of Act under section 15 of the Charter.

Issues and findings:

> Test for discrimination under section 15 is whether a distinction is 'fair and reasonable, having regard to the purposes and aims and its impact on persons adversely affected.
>
> Test for discrimination is objective.
>
> 'Citizenship' held to be covered by s. 15 umbrella clause.

History: applicant was unsuccessful before the B.C. trial judge. Appeal allowed by B.C.C.A. No appeal to S.C.C. of which we are aware.

**Fraser et al. v. Nova Scotia**

N.S.S.C.-T.D.; June 1986.

Facts: individual applicant was a civil servant who wished to join and actively participate in a political party, contrary to the Nova Scotia Civil Service Act. Prohibition in act challenged pursuant to section 15 of the Charter, by individual applicant and his union.

Issues and findings:

Applicant union not an 'individual'. Nonetheless, ruling would have effect on all members of union. Unduly restrictive to deny union opportunity to be heard and thus require members to act individually.

Mentions test in R. v. MacDonald (O.C.A.), i.e. 'necessary in the attainment of a socially desirable objective and is not arbitrary or capricious.' But this test is rejected on the basis that--

Alleged infringement deals with fundamental freedoms and democratic rights as in section 2 and 3 of Charter. Distinguishing between groups in denial of these fundamental rights is in itself discriminatory, and discussion then moves to section 1.

History: decision of first instance. No appeal of which we are aware.

**Re British Columbia and Yukon Territory Building & Construction Trades Council**

B.C.S.C., September 1985

Facts: B.C. law allowed contractual exclusion of non-union employees from building sites ('non-affiliation clauses'). New law for Expo allowed sites of 'special economic importance' to be notionally subdivided to be smaller units, so that non-affiliation clauses were effectively avoided for some parts of the project. Effect was limiting the non-affiliation provision of the B.C. Labour Code. Argued that this was in violation of section 15.

Issues and findings:

> 'Discrimination' means (basically) singling out a person or class of persons for purposes of different treatment because they are members of that class.
>
> 'Discrimination' does not mean that all must be treated the same. When an inequality results from a distinction which is not "arbitrary, capricious or unnecessary", and is further 'a necessary departure from the general principle of universal application of law for the attainment of some necessary and desirable social objective", then no discrimination is said to occur.
>
> Effect of legislation must not contravene equality.

History: Appears to be decision of first instance. No appeal of which we are aware.

**Kask v. Shimizu**

Alberta Queen's Bench; April 1986

Facts: extra-provincial plaintiff had been required to provide security for costs. Claimed that this was in contravention of s. 15 of the Charter, as she was treated differently from a citizen of Alberta.

Findings:

> The purpose of section 15 is to further the values and principles essential to a free and democratic society. Individuals to be equal in the eyes of the law when charged with an offence (equality before the law), and to be guaranteed equal benefits of the law (equality under the law).
>
> Issue under a non-enumerated ground of discrimination is whether discrimination would undermine the 'essential' or 'underlying' values of a free and democratic society.

History: appears to be decision of first instance. No appeal of which we are aware.

**Ontario Human Rights Commission and O'Malley**

**v.**

**Simpsons-Sears**

Supreme Court of Canada, December, 1985.

Facts: Fundamentalist who observes saturday sabbath required to work saturday by her employer. Issue was whether this was discriminatory.

Finding: "adverse effect" (constructive) discrimination constituted 'discrimination' within the meaning of section 1 of the Ontario Human Rights Code.

History: Board of Inquiry: allows claim of constructive discrimination; Divisional Court (finding unclear); Court of Appeal finds that constructive discrimination not discriminatory; Supreme Court of Canada allows appeal.

MEMO

TO: CMC and file

FROM: peter

RE: Glad Day/Gay Sex and s. 15

DATE: 13 January 1987

Charlie:

You asked me to look into section 15 arguments that might apply to the Joy of Gay Sex case.

As you correctly point out, the test of discrimination which is coming into increasing prominence in Ontario is 'treating members of similar groups differently': v. Swain, Macdonald, etc. Unfortunately, I can find no meaningful discussion of how one defines what groups are similar. The Swain decision could perhaps be used to suggest that there is in fact no rationale.

I draw your attention to the Kask case at 71, however , regarding what groups are covered by the umbrella clause of section 1, that is groups defined either by immutable and particularly physical characteristics and groups whose special status is defined elsewhere in the charter, e.g. religious minorities, who are protected under section 2.

Other parts of the country are coming up with some cases which might be usefully perused, however. Cases frequently point out that all laws discriminate, so that a more refined test of discrimination must be developed: v. Andrews at 605 f., for example.

These cases do not yield a standard version of discrimination, however. A frequent test is whether the distinction drawn is "arbitrary, capricious or unnecessary" as opposed to rationally based and an acceptable and necessary variation from the norm of universal application of law: see, for example, Smith, Kline at 368. Andrews may come into this category, in its test that a distinction be "reasonable and fair": see p. 609.

For our purposes, I would suggest that a more useful line of cases are those which consider the interrelationship of section 15 and the rest of the Charter. These cases would seem to hold that section 15 is offended when some people's charter rights, particularly under section 2, are restricted more than other people's rights. Clearest on this point is the Fraser decision,

at paragraph 68 (page 103). It is arguably also implicit in the Kask decision, for example, which adopts a purposive interpretation of section 15. The purpose is said to be the further protection of those values and principles that we hold dear in a free and democratic society. Unequal availability of Charter rights between people would thus appear to be particularly offensive to section 15.

To put that into our perspective, the argument would be that the rights of a gay person to expression under section 2 are restricted more by the guidelines and the practice of Canada Customs than the rights of straight persons. That would prima facie violate section 15.

A few minor sub-points.

Since the guidelines concern "sodomy (buggery)" rather than 'homosexual literature', for example, we may have a constructive discrimination problem. For that reason, I have copied O'Malley, the most recent case on constructive discrimination that I am aware of. Unfortunately, it is a Human Rights Code case, not a Charter case. I haven't read Edward's Books on Art yet; does it touch on that? I can certainly copy cases like Griggs Power if you want to get into this.

Secondly, if you get to section 1, I trust you will argue your standard 'not proscribed by law' chestnut?

p.

- can't have equality rights
can have free speech

# Corporate appellant

For individual readers

- at store

shlders

- Smith Kline 24 DLR (4th) 321

Corp. does not ordinarily have standing

* Re Homemade Wines 26 DLR (4th) 468

corp has no standing

Re Surrey

Nov 6/85

Mund v Medicine Hat

(1985) 67 AR 11

* Parkdale Hotel v AG (Canada)

1986 27 DLR (4th) 19

Similarly situated

Re Chung 54 OR (2d) 650

— labor-bd case on policy

held - not similarly situated

Re Lavigne 55 OR(2d) 449

- not similarly situated

R v Swain 53 OR(2d) 609

not similarly situated

* Re Berol 53 OR (2d) 275

Kash v Shimizu 28 DLR(4th) 64

discrim. that undermines essential or underlying values of a free & democratic society

eg based on some immutable characteristic
or
based on some other charter right
eg freedom of expression

Re Fraser 39 ACWS(2d) 401

where inequality relates to a fundamental right
must go to sec 1

# Unenumerated grounds

Smith Kline

24 DLR (4th) 321

evaluating the categories created
i.e. whether dissimilar categories justified

[is this a sec 1 test]

Re B.C. & Yukon Build. & Const. Council
v AG (BC) 1985 22 DLR (4th) 540

is there proper rational purpose pursued in arbitrary fashion

discrim. based on the importance of the project not to individuals who work on it

ie. is there an objective & reasonable justification

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(*) - Graphic



| Sex Act | The Joy of Sex | More Joy of Sex | The Joy of Lesbian Sex | The Joy of Gay Sex (3rd ed.) |
|---|---|---|---|---|
| Anus (other than penis) | 158 ("Nearly every couple tries once") | | 18-20; 41* | 17-19, 44-45* 77*, 79* |
| May be Anal sex | 51-52, 113, 147, 148 (INVERSION - "NOT homosexuality" p. 194 | 30-31, 32, 33, 68-69, 190-195 191 - advocates anal sex | | |
| Anal Sex | 158 | | | 18*, 32-33* 64, 68-69*, 71* 80-81, 162-163* 174, 181*, 191, 194 |
| Penetration | (3) 65, 66, 68, 88*, 101, 102 119, 122, 123 133*, 153, 155 173, 175 177 179, 194* 206 221, 222, 239, 240 | (2) 34-35, 40-41, 44-45, 67, 76, 77, 78-79* 80-81, 85, 126-127*, 199, 202 | (2) 73, 74, 82 85*, 133, 137, 151* | |
| Penetration with Objects | | | 29-31, 174* | |
| Oral Sex | 137-140, 165 | 21, 22, 23, 116, 146 | 60, 152-153*, 156* | 26-27, 27* 40-41*, 146-147, 183 |
| "69" | | 118-119 | 152-153* | 168-169* |

| Sex Act | The Joy of Sex | More Joy of Sex | The Joy of Lesbian Sex | The Joy of Gay Sex |
|---|---|---|---|---|
| "Crab" | 155 | | | 52-53 |
| Gadgets | 184-189, 195 | | | 88-89 |
| Bondage / S/M | 165-172, (169*), 209*, 197, 246, 247 | 100-107, 55 | 33-35 | 30, 159-161 |
| Wrestling | | 96-98 | | 199-200 |
| "Watenworks-Scat" | 252-253 | | | 161-162, 198-199 |
| Rimming | | | | 155-156, 156-157*, (77*) |
| Three-somes | | 180* | | 187-188 |
| Four-somes | | 145*, 158, 162-163, 166* 168-170, 171* 172-173, 176-177, 178-179 | | 144-Orgies |
| Bi-sexuality | 223-224 | 110-116 | 31-32 | 22-26 |
| "Fist-fucking" | | | | 82-84 |
| | 5 graphics | 6 graphics | 7 graphics | 14 graphics |

# NOTICE

This book written prior to recent identification of AIDS.

AIDS may be sexually transmitted

Advise/information should be considered in light of present understand of AIDS

If you have any question we suggest you consult your physician or qualified health representative

French language edition

Les Plasirs de l'amour gaies

-translator - Michele Chevrier

Pub. by Editions Intrinséque Inc

Dist. by Messageriel Prologue Inc

now Diffusion Prologue Inc

2975 Sartelon
Ville St. Laurent
H4R 1E6
ph. 514 332 5860
Pres Guy St. Jean

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— the Guideline is used by
- official etc
-
is it used by top guy

Now allowing oral & vaginal penetration

— that both books ruled on
— that Joy of Sex
More Joy of Sex } imported freely
— that Guideline represented
a change of policy
on anal sex

Customs has been stopping
all references to anal
sex
even safe sex information

has meant a much higher
proportion of gay mag's
& lit has been stopped

~~Cases~~

~~Procedure~~

Comparisons

└ if she give opinion on Gay Sex

Compare to Joy

└ explicitness of genital/anal sex

group sex

bondage

if they bring in censored mag's - gay

└ compare to admitted mag's - gay

similarly if straight

Ask Murphy

- Why other sex activities not mentioned
  Previous Guidelines
- That other books admitted
- Decision on Gay & Lesbian

✓ [Are you bound by Guidelines? is Dep. Minister?] — fettering

---

Do you consider
- internal necessity
- artistic merit
- personal use or resale

MEMO

TO: CMC

FROM: peter

RE: Cross-Examination of Lynda Murphy

DATE: 18 January 87

Charlie:

I don't have a great deal to say on this, but here goes for what I've got.

It strikes me that the most useful information that Ms. Murphy can provide deals with the search arguments. specifically, you presumably want her to say that the customs officials are not able to act judicially. She could presumably also testify as to unequal application of the guidelines accross the country. "The Joy of Lesbian Sex" is one example (banned in BC, not in Ontario), although presumably not the one you want to use, as it would undercut your charter arguments on equality.

Obiously, you want her to testify that there is no prior authorization for searches, notwithstanding that as the material is in the custody of the mails, there is no obvious reason why dubious packets could not be held for, say, 2 hours while the appropriate authorization is obtained.

Similarly, you presumably want her to testify as to the instructions given to officers about what packets ought to be opened. Are there 'reasonable and probable grounds' to believe that what is in a packet is in violation of the guidelines? I doubt it.

You might wish to try an attack on the system internal to Customs. Who actually supervises these searches? What qualifications do the searchers have? Are they experts in 'community standards'? How are the individuals who make the decision to search and seize identifiable to the person whose rights are violated? What are the minimum qualifications for this job? Is there any accountability at that level at all?

You might also wish to get into how the deputy minister makes decisions. I find it difficult to believe that they pay some

bozo $80,000 per year to read dirty books. Presumably, there is a bureaucratic structure there which is open to attack.

All the way through, you presumably want her to keep saying that the onus is on the person whose rights are affected to act, and that no submissions or other natural justice provisions apply.

The aim on that line of questioning is to suggest that the system operates, not only outside judicial control, but outside even meaningful bureaucratic control. As far as I know, there is no caselaw that proscribes meaningful standards for searches that are warrantless. While I don't think we should allow that a warrantless search is justifiable here, I do think we should butress our arguments by stating that even if the warrantless nature of the search is justified, some standards still have to be in place. The present search has to be unreasonable. Presumably, you will want to talk with Max Allen or some other person knowledgable in Customs searches to ensure that the system is in fact demonstrably out of control in the ways you want to claim it is.

Essentially, I see this as a chance for you to make the Max Allens of the world happy. Put Customs on trial. If my understanding of the search procedures is correct, I don't see that you have a lot to lose. If the evidence would be good for their case, presumably the crown will introduce it anyway, since the proceedures are an obvious Charter attack.

I shall come around to court as soon as I'm through my own trial.

Best of luck and have a good time--

p.

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— disproportionate effect.
anal sex more common in gay community

(Lang.)

---

— that Joy of Sex is main text in gay community

— Guideline — to show the categorical ban on anal or admission

— book directed at gay & interest & then sold through gay book stores (not exclus)

— experts — books are roughly equal

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## Costs

↓ Crim Code applies for proceed cc cost
Tariff is low

but ↓ Civil Rules re costs apply
then civil costs
- look to general provisions of relevant Acts

↓ civil rules apply
do all rules apply
eg re Expert witnesses etc

48(18) Jurisdiction to grant costs

48(16) - deemed to be "an action"

refers to Exchequer Ct Appeal

Costs

└ scanty disclosures
- only generality till day before trial

- the guideline

Marchand 39 ACW 5 (2d) 406

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1

## Everden

- O.K. To look to see if changes make any difference

- no agreement re edition

## G. Vander Volk

- tariffs evaluator administrator DCA
  = Dom Custm Appraiser (old)

- goods not opened till parcel opened
  when person attends
  open in judgement
  of inspector
  in their presence

- Commodity Specialist

- Customs Appraiser

ask all books

- if uncertain hold
  & send to Manulife
  Centre for classification

- hold the book

Guidelines in force
D9-1-1

Ex 1

list of prohibited good

not an exhaustive List

List (p. 56)

Ex 2

- is there a description

then referred to commodity
specialist
who gives

---

- can appeal
  giving reasons

When I make a determination the pages are marked

- then I notify
person

---

then an appeal to
Deputy Minister

-

Ex3 Notice of Detention

Reasons Anal Bondage

Part C not available to importer

Ex4 Appeal to me by Form B2A

Ex5 The book — the other book

L fell : Guidelines E 9-1-1 ~~with~~ on buggery

Why

- who prepared Ex 1

- they appealed to Deputy Minister

Ex 6 — letter re Appeal to Deputy Minister

— anything else said

Ex 7 letter Apr 28/86

- where is reason

in your appraisal home doesn't matter

bindelines sex neutral

explicitness — a factor

Murphy

- Man- Prohibited Import Unit
- employed 8½ yrs
  - Mgmt
    2 Sr Officers
    2 Jr

Respon. for 99201-1

- advise foreign publishers
- advise guidance
- review & report to Dept Mi for Appeals

I don't make the decisions - report to & advise Minister

- outline the item
  cross reference to Guideline
- sometimes ask for Justice opinion
- usually to Ass. Dep. Minister

- Jay of Gay
both Ass & Dep.
decided

Ex9 list of concerns

L those the only concerns

Do you make a rec'd anything else

re Guidelines

prepared by officials

not exhaustive
a very good outline of
the kinds of concerns

officers don't have to be thorough & careful (NB)

- Apr '86
was it on the list
it was on list
from Jan/86

(8)

— the distributor sent book to me

Ex 10 letter to Stoddard gives reasons

How many 4000 items

that you see opinions decisions

We prohibit 65%-70% of stuff

— 90% of our stuff is obscene

— vivid intercourse oral-genital

only looking for items in borderline

— interim tariff item

looked upon as interim till CCC is amended

9

## Ms Murphy

— her opinion

— why them on the list

— new guidelines < allow in other sex

— draft legislation ccc
allow ed pup

— memo on this book
doesn't do
Community standards
merits of book
purpose of the author

— re distribution

R— Memo ——

└ all explicit sex

(11) Stoddard

- Jay of Sex #944, #316
  72 → 85
- More Jay 96
  73 → 85

Box Set Jay Mor 56,680

Gay 9,343

Lesbian 5713

as of end of '85 we're not the distributor

---

CX.

- RCMP visited
  book on restricted listed
  doc. not forthcoming

We objected

we intended to challenge the
notified opinion PaperJacks

an educational guide

about the comprehensiveness of gay life

Lteaches about sex
as part of totality

teaches all parameters
lovers
~~friends~~

for coming out

mostly non-sexual

coming out — problem — lack of info

needs info re sexual life

∴ exploited

info

sex — almost everything

tried to deal with common activity

— fellicists

— not the censor
give info
then individual

didn't tell people what
to do

Fist-Fucking — have to know

anal sex — common in gay
community

— not available elsewhere
would be harmed physically

illustrations — to illustrate
to be sensual without
being pornographic

— follow our objective

to express tenderness

compare to Joy of Sex

till 2:30

CX- Dr Silverstein

monetary motive

Publishers chose title

title was familiar

- ~~intended~~
- sold widely
  assumed most buyers would be gay

perhaps straights would fear to look because they might be thought gay

public disapproval

topics stand by themselves

— read some parts independently
  eg lovers
  fist fucking

sex therapist for both

— anal intercourse ~~not~~ almost exclusively

but not completely

— anus section refers to societal taboo

basis of taboo embarassment re elimination

not so true today

hetero use anus digital common

taboo is embarassment re elimination

-taboo goes to religious sources

Society doesn't think anal intercourse is as valuable
I agree

---

book doesn't speak to sex relations without consent

non consentual anal intercourse is rape

p.18 drawing
how assist in informed consent

to indicate position

anal sex in our literature

objections
- some isolated objections

book is intelligently done

cover has an announcement of contents

---

Joy of Sex
- books very similar address a sexual community all do it well

all intend education

Hawkins

(J) is anal is central act

replaces vaginal

versitality most respected

is very central

---

Non Fiction

except

Self-help

1990

for first

two years

---

— any book 5000 in first year

is best seller

— long life

very very well

strong backlist
will continue to sell

---

Self-help

- incredibly well done

objective met well

informative

manual for homo men
to assist
pleasure from
each other as
individuals +
sexual being

Stylistic difference

suitable to each community

Gay - language more objective harder

Joy of Sex in between

that reflects literate of the three communities

no difference re explicitness

---

CX

- want it based on sales

no -

refer to good sales of Joy S

— general public wouldn't read

— title wouldn't scare them off

not interested

homosex. removed as diseased

does not require intervention

futile to change to sex preferences

see them for physcois

would adapt them to gay life style

- help with coming out in gay community

Most common { oral genital
masturb
2nd - anal
othrs rare

- great majority have tried oral 90%

mast.
anal - tried by 80%
1/3 practice regular
1 x @ more +

---

homosexual
- Kinsey 37% to climax at least 1x

our data 40% +

only aroused by homosexual 4%

throughout life 8-10% exclusively for 3 yr's

heterosexual – anal

43% have tried

2% do it regularly

1 @ week or more

– ½ pop can experience

orgasms

without intercourse

hetero's

majority 90% is vaginal

60 try it

50 do it regularly

masturbation

Reasons

① Well written – simple for Laymen for high school or less

– lots of useful info for gay subculture – accurately reflects problems

– appropriate warnings re disease

– has cultural data & references

useful for gay

90% have limited sex education

double pub for gay

~~covers~~

43% are rdes relationships myths

9% disease

26% – sex practices descriptions

Joy of Sex — more on sex practices

41% are sex practices
11% on sex roles

Gay ~~[illegible]~~ lurid
— descriptions ok
far from lurid
straight forward

14 on anal
16 on oral } a reasonable balance

Gay is most serious
JofS is humorous

~~Photo~~
Pic's 60
majority
25% are nudes
no contact
12% clothed
Sex
7% kiss
12% oral
20 mastrats.

23% anal

they're romantic
not sexy

Joy 121 pic
- 36 of vaginal intercourse
- 20 nudes

non sex
- 10% oral genital
10% kiss
10% touchy
10% mastny

- both book deal with practices
are representation

- pic's attempt to show technique etc

- info reflects professional knowledge
sound Conservative

practice of any type of sex eg anal
is not abnormal

CX

- don't encourage anything
- deal with difficulties as the arise

- any reluctance to do anal

- 50% of males find arousal
  43% will try

those who don't make be uninterested or disgusted

- in hetero - vaginal, oral } are most common

- Why anal so low
  - it is difficult
  - pain
  - ~~some~~ 50 don't get erotic sensation

— attitudes of public ~~to~~ anal
to anal
from survey
hetero males a fraction disgusted by anal 1/5
same as those
— disgusted by oral genital

among homo figures smaller

p.77 — tongue in anus
illustrates less common practice
running — less common in hetero

Durid — explicit to show sex without
any educational value
have suggestive arousing

line drawing less arousing than movies
or pic's

hetero intercourse stimulates everyone

these pic's have weak arousal
value

Joy topics are page or less
~~long~~
page-by-page with be even
more favourable

Dr C.

lurid / pinent } — designed to get attention for sex
to draw into arousal

not the purpose of these book

neither text nor drawings - lurid

have used anal intercourse in context

language is different
uses "fucky"
cock instead of penis

- crucial as the other book

not crucial
but they are valuable

- at least 1/2 with Ontario

anal - often people embarassed

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[R. v. Glad Day]

Jan 19/87.

Glad Day Bookshops v. Dep. Min. Nat. Rev., Customs & Excise

Opening Statements

Mr. Campbell

- explain Customs leg.
  - Sec 47, 50 Customs Act
  - 99201-1, Schedule "C", Customs Tariff Act, Sec. 14
  - Sec 153, Customs Act

Refers to North American News for authority for trial de novo

discusses two books; first book seized; second book has minor changes

Crown

① - second book's changes make no difference to ultimate issue ie still obscene

② - Crown can't consent to examine only second book as if it were the one seized

③ - Crown notes that appellant has given notice on Charter issues - wants his witnesses to speak to this
  - Judge says OK

1st Crown witness

Gerard VanderWalk

- Toronto
- Employed by Nat. Rev (Customs & Excise)
- Tourist & Values Administration

- formerly a Dominion Customs Appraiser
- formerly a ORAm books specialist
- formerly a Customs Inspector (1970-1981)

- discusses details of how he cleared published goods as a Customs Inspector
  - if issue manifest, parcel not opened
  - when importer arrives, then package may, at inspector's discretion, be opened in front of importer

- process for prohibited goods
  - books held; need for physical evidence
  - K 27 - notice of detention form
  - books reviewed on basis of guidelines
  - Also lists of prohibited publications

  - not an exhaustive list → "the guidelines"
  - list of prohibited books is available to public

  - not sure if book was on this list JOGS at time of seizure

  - publication is compared against the guidelines and the list
  - decision if book should be prohibited is made by a commodity specialist

- Appeal by Form B-2-A ; pages that are seized under are highlighted, and then those pages & sections are read.

( then decision is made to affirm or release decision

- Appeal by K 14-0 to Dep. Minister in Ottawa

- film exists on The Joy of Gay Sex

- Review of detention form of this book

- Appeal taken by the importer ; considered by this witness

( he examined the book

( why did he prohibit book?

- told under the guidelines ⇒ pertaining to buggery & sodomy - Anal penetration

( p. 3 of guidelines
4 (A) (B)

- who prepared the guidelines
( Customs personnel in Ottawa

- Appellant filed an appeal to Dep. Min.

- sent books to Ottawa

- decision by Prohibited Importation Office in Dep. Min.'s Office ⇒ decision in issue

- because it was sexual relations with men; was this important
  - NO

X CROSS-EX

- exib. 7 → are reasons given to importer.
  → maybe also get copy of K14D.

  but no further particular reasons.

- JOGS & JOLS both seized & ruled on.

- JOLS made exib #8

- when appeal to Dep Min from his dec'n, nothing else to Ottawa.

- re guideline → dec'n made under s. 4(8)
  → status = guideline only
  NOT permitted to deviate from interpretation
  - but has some leaway (?)

* when something w/ explicit buggery, wd fan it - no discretion

- previous guideline → reference to anal sex? - unsure.

-

Linda Murphy – Chief.

- live in Ottawa – employed by Customs as Mgr. of Prohib Import Unit – 2 yrs
- Prohib Imp Unit = unit for admin. & interp. of 99201-1
  - functions = internal, service to publishers whereby they can submit books ahead of time for reviews + opinion as to admissibility.
    - resp. for handling prohib. material & reporting to Dep Min for assistance in his decision.
    - no decisions made by the unit, only renders opinion
    - only decision on classif. can only be made at time of entry.
    - opinion as to whether a book would fall w/i 99201-1
    - then LM will go thru it & prepare a package of the material, & review & documents.
    - very often in review, will ask for assistance from Dept of Justice. (for their legal opinion)

- assist. Dep Min will make the dec'n generally.
  unless very grey area → then will go to the Dep Min

- LM examined JOGS.
- this dec'n was made by Both assist & Dep Min

- "list of concerns" was prepared for JOGS.

* * ↓ items page listed on docu wch show areas of concern.

= exhaustive list of concerns

*** no difference that men having sex w/ ea other.

- memo. prepared by Customs + Dept of Justice.
- avail to public — avail at any customs office.

- memo ≠ exhaustive, but good outline wrt the kinds of concerns

- prohib public list = avail to public.

- send out couple 100 everytime list update.
  - mailing list, anyone who requests it

- list = guide for customs officers across Canada.

- thorough review = 1-2 hrs.

- border inspectors don't have that time,
  i.e. inspectors use the list

- JOGS was on the list -

- JOGS incl. since Jan 86.

- JOGS had been reviewed prior to Jan 86.
  - copy was sent in Oct/85 asking for opinion
    - was reviewed & informed Stoddart that would fall w/i guidelines.

- exhib 4/10 — letter to Stoddart Dec 4/85.

~~[illegible]~~

- approx 4000 items received per yr.

- ~~of~~ most common = 1. magazine
  2. books
  3. video films
  4. misc.

- out of 4000 → 65-70% would be prohib.

- subject matter = - books, printed ... wch are.
  treas/sedition (negligible)
  obscene (90%)
  hate propaganda. (10%)

- types of acts depicted are just about anything in the material.

* not concerned w/ profit of sex.
  * concerned w/ material outlined in memorandum D911

- tariff item not permanent
- temporary - ceases June 30-86.
  - has been extended Dec 31-87 in Bill C-1

* b/c pertains to Code, will be interim until new Code provision enacted.

- new Bill C114 → contains profit. against oral + anal sex

  ↳ goes further than guidelines.

---

X-EXAMINATION

- letter to Mr. Stoddard
- book then on prohibited list

- letter's opinion is advisory only

- prohibited list includes advisory opinions; strongly recommended that they follow this guideline
  ↳ do follow it 99% of time

- different from police force determinations to prosecute for obscenity

- what did you give Dep. Min.? / not sure it included

Advising ~~letter~~ letter

- Any advice given to Min. re educational merit of book, etc

- no; only follow objective criteria; exhibit I; not purpose of Customs to examine "merit" of book

- Also didn't give any info. re community standards of tolerance; not role of Customs

- Customs Act also makes no distinction b/w. private ownership & distribution

- Exhibit I developed after Luscher

- now, only prohibit anal intercourse

- Any depiction of anal intercourse is banned

- Any decission made prior to April, 1985 are declared null & void

- Joy of Sex is released import item
  More Joy of Sex is released import item

Defense case:

① Jack Stoddart → chief:

- handles approx. 20000 titles per yr.
- JOGS → was Can. distrib until mid 85.
  JOLS → same.

ex. #11 JOS } → distrib — imported into Canada since 1972
ex #12 MJOS } — " " " " 1973.

- circulation
  JOS → 944,316 (1972 – 1985)
  ~~JOGS → approx~~ (
  MJOS 96,292 (1973 – 1985)

  ~~[illegible]~~ ~~[illegible]~~
  JOGS 9,343
  JOLS 5,773

- Result: both JOGS + JOLS → more sold.
  - others all'd to import
  - other retailers have brought in via parallel importing
  - higher sales than those given
    - impossible to guess

- co. is NOT presently distrib of JOGS.
  - 2 different editions
    hardcover — Crown Publish
    paperback — Simon Schuster
  - no longer related to Crown
  - mid-1985: Simon & Schuster changed distrib to Pocketbooks — wch is

NOT associated w/ Gen Publish

f. 4 books switched to paper jack bfd.
web is subsid. of Simon-Schuster

CROSS

→ largest supplier of books from US & UK.
- in 1 yr, approx $16 000 000 worth of business on imported books
- all come in thru customs.
→ have been involved in inspections
- expect books to be examined & classified a.p. tariff.

→ mid-85: visited by RCMP, & notified that were importing books illegally
- did not see documentation quickly.
- objected to the restriction w/o consultation.
- did not realize that distrib was going to shift
- sent to Ottawa for review for clarification
- but then distrib changed — no longer had rights to sell.
- new distrib (Paper Jacks) notified

Silverstein : chief.

→ ex #13 — CV of Dr. S.

→ (runs thru background, education etc).

→ since 1974 — devoted career to gay community.
- treating w/ emotional problems
- organized counselling centres.
- also trained others to do same kind of work
- work w/ heterosex. therapists to offer services to gays.
- clinical papers published
- wrote 3 books for gay books:
  ① Family Matter — for parents.
  ② TOGS (co-wrote w/ E. White)
  ③ Man to Man (clinical study).

book to help people come out of closet
- educate people about gay lifestyle.

→ institute for human identity — organized in 1973.
director for 5 yrs.

→ psych consultant for Hillsdale Park Police.
- interviews candidates to determine if emotionally suited for police

- Jags translated into Dutch
  French
  Germ
  Italian
  (?) Japanese.

- work outside NY → deliver papers to various conventions
  → certified sex therapist
  → consultant to public institutions
  eg: California → BC.

- co-author White → novelist -
  - friends for # yrs B4 book
  - never collaborated B4
  - "He had more extensive knowledge of sex"
  "I had more knowledge of psych."

desire: ✱ Book that they wd've wanted while they were growing

→ purpose: educational guide
  - no need for pornography
  - wanted to write about comprehensiveness of gay life
    — sex only part of totality

of gay world

— reader to be taught about all parameters of gay life
- lovers
- friends
- fmly

- found they had more non-sex items to write about than sex

2:1 ratio in book

non sex | sex

eg goals
- tenderness & care
- love
- health. - diseases
- fndg good physicians
- teach about how one to "come out" in life as a gay indiv

— difficulty in gay person "coming out".

lack of ~~ed~~ information

- doesn't know what homosex means
- " " " types of rewards possible
etc.

- person who lacks info will be exploited

I'm wanted to put info for someone

needed to enter gay life

- info protect people

→ non-sexual topics dealt w/:

- body image
- alcohol
- problems of coming out
- depression
- growing older
- friendship
- guilt
- sex dysfunction
- fidelity - monogamy
- meeting people
- rejection
- esteem
- tenderness
- how to say no.

→ kinds of sex topics: tried to list all known sex behaviours.

- fellatio
- intercourse
- sado-masoch. sex

→ did not want to be a censor.
- to have info in advance is to be prepared to make decisions about life.

→ described dangers

→ never tell what to do — just to give info & they have to decide

→ eg: fist-fucking

↳ to leave it out wd be irresp.

"it's extremely dangerous"
"cd be fatal"

= wanting to give info so someone cd make decision.

→ "anal sex" → purpose of describing:

- has been around long time
eg - cave-men on caves

- condoned by gays
- enjoyed by them.

→ to write about gays w/o anal intercourse wd be stan

→ no where else for them to get information

* → letters of appreciation about anal intercourse.

→ "first time" section → step by step procedure.

→ written w/ tenderness

→ purpose of illustrations → to illustrate certain sections
→ make book more central w/o being porno.
– chosen by public.
2 kinds of pictures:

Front / colour plates →

line drawings →

– very drawings not of sex, but about people talking

– trying to integrate the material talked about

– no actual sex in any of the (colour?) pictures.

→ relationship btw FOCS & JOS:

– read JOS.
– ~~not~~ purposes not same.
– looked at JOS → wanted focs to be different

viz. ~~conceived as just~~

wanted to reflected problems

of gay community

- writing style & reflect gay men

* wanted authors to be reflected in book
esp. warmth & caring

CROSS

- look at book's last cover - price: book is being sold in U.S.

- purpose of book - to sell it

- who choose TITLE - publishers; connection with Joy of Sex; increase familiarity with book

- who would buy it; mostly gay, but heterosexuals would possibly, or could look at it

- book has separate sections; could you read each separate section
- possibly

- fair to read only certain sections, not reading whole book
↳ possibly, but not very profitably

- sex therapist
- Anal intercourse not exclusive to homosexuals
↳ Answer: Almost exclusively homosexual

- section on Anus; section on first-time
  - there is a taboo why

    - issue of elimination
    - is there a taboo in our society against using Anus for sexual intercourse?

      - No, not today; young couples use digit in Anus for pleasure

    - taboo referred to in book deals with elimination, not sexual intercourse
    - society at large doesn't think anal inter. as valuable as vaginal intercourse
    - but not writing for society as large, but only for gays

- do women have concern with taboo of Anus/elimination
  - don't know; sexual attitudes have changed markedly
  - women masturbate; manipulate Anus as well (his survey)

- point of book - informed consent
- doesn't deal with non-consentual sex

  - correct; book deals only with adult consensual sex

- drawing p. 18 in book - how does that assist in informing person about consent

A - drawing doesn't say anything about informed consent; only shows a certain position

- All the different drawings show different anal sex positions

Re-Exam.

→ royalty from sale of book → ca. 18¢ per book
→ advance = $6000
17,500 on subseq book.

COURT

→ anal sex replaces "vaginal" sex in porn ex
but there are some gay men who prefer, eg, oral sex

today → versatility is respected most
i.e. oral sex is very central to porn ex.

Karl Seigler → Direct:

→ publisher for Taken Book.

→ Ex 14: resume.

→ education :- BA (hon) MA in literature
- taught at Simon Fraser - literature.

→ Jan '74 - business mgr started
- now CEO & Ch. of Bd

→ "publishes" = to make public.
- makes decision as to what co will make public

→ Talon Inc = most prestigious publisher of drama, literary title
(i.e. serious adult fiction, drama, poetry)

60% sales to college courses

- some non-fiction publishing

→ Assoc of Can Publishers → 75% Can-owned & controlled
(dist from Can Book Publishers Council → foreign owned).

→ been on ~~executive~~ since 1975.
- various committees w/ the Assoc.

→ knowledgeable about : - parallel assoc.
- what sells
- what's imported
- financial growth & health of Can publishers.

- must understand everything about Can. publishing ~~and~~ industry

→ consultant to Manitoba 1983 — wrote policy.
— negotiated w/ Fed gov't w.r.t. culture

→ in capacity as publisher, receives 120 manuscripts/yr
to see whether publishable

— publish about 12 new titles/year
— reprint " 10 titles.
⇒ i.e. 20-24 books / yr.

→ # of gay authors on list
— not a majority of authors.
→ all decisions are immaterial of whether
~~they~~ author is gay.

— best titles happen to be written by gay authors.

~~Key~~ Desert of Heart
Michele Tremblay
Bill Bishop.

→ no subject that will not read the publication

expert status subject to w.t. & relevant:

→ there are no data on performance of various
genre of literature (i.e. sales)

Stats Can — unreliable
— never follow up titles.

→ Can Council - supports most books except "self-help" & "how-to" books.

~~[illegible]~~

1.: not good data either

But - any title wch > 5000 in 1st yr is cosidered "best seller".

also - any book wch will do well as a back-title, ~~[illegible]~~.

→ JOGS → 9000 regarded as book wch sells very well.

- definitely not a small run.

→ compared JOS, JOGS, JOLS MJOS.

JOGS: wd have merit
- ie wd publish it if it were avail.

- ie majority of Can publishing industry wd be interested in publishing in Canada

- it wd continue to sell in Canada for many yrs

→ publish = implicit editorial control
i.e. take resp. of originating book
in a certain territory
- resp. to pay © royalties.

distrib → none of these controls
- simply agree to distrib, market
in a territory on an exclusive
basis.

→ TOGs merit = self help / how to genre
- incredibly well done.
- clearly discernable directive
- informative
- accomplished piece of writing

directive = manual for homosex men who
assists them in obtaining sex. pleasure
from each other as human beings.

illustrations → no problems
- pictorial illustrations are
presentation of what's in text
in a different medium.

- and sex - not concerned in least

- " " comes up occasionally in
fictional literature

→ no signif. public direction to JOGS
(maybe in few isolated cases)
- book is very intelligently presented
- on cover, an announcement of its contents in no uncertain terms

→ wd expect the general public wd'nt even pick up the book
(unless were gay).

→ compare JOS & JOGS & JOLS = consider to be very similar in that they address certain community
- all 3 do so tastefully
- intent = education & instruction

→ stylistic differences in all 3.
viz ea. suitable to the community to wch addressed
eg JOGS - language "harder, more direct" than JOLS

→ that is reflected in the literature as well.
ie consistent w/ vocabulary to the community addressed.

→ explicitness → no difference

CROSS

- The Joy of Gay Sex - you would publish it; is it because you know it sold 9,000 copies

↳ you would inform yourself

- but if you didn't know figures, or it was new, would you publish it

↳ PROBABLY yes, because of success of Joy of Sex

- would you have done marketing analysis of this book?

yes

↳ would you have tried to determine size of market, and possibility of sale

↳ yes

- do you publish books of sexual content like this

↳ only books with sexual content, but not sex manuals like this

- general public wouldn't pick it up: because

Title would scare them off

(No, not scare them off, it's just that public wouldn't have interest in this book, except as idle curiosity

(so public wouldn't know of content

(A. Except title is very explicit so it should be clear of content

## Fenald Moldenhauer

- President & principle shareholder of Glad Day Book Store

- 598 A. Yonge Street

- specialize in gay and lesbian literature; three book stores of this kind in Canada

- Also have a second store in Boston

- how many titles

(5,000 in six or seven languages, French, German, Greek, Chinese

- book store organized as in most serious book stores - history, politics, Art, etc

- sold book FOGS in all of its editions

- FOGS has achieved a unique status in gay community - sell 300-400 a year

- Also sell Joy of Lesbian Sex ; doesn't sell as well as JOGS - 200 a year

- book imported into country by Glad Day ; why not buy it from distributor

↳ got letter in Sept. 1985 from Jack Goddard ; p's. send JOGS back as it was banned

- what did you do when you received this letter ?

- very sad ; even prosecuted , special importance of book was great

- what did you do ?

- sent out telegrams, etc - spent $300.00

- not political ; what Customs they did you do ?

↳ claim that we would have to challenge the book barring ourselves

- so you took steps to import it ?

↳ yes , from Boston copy of Joy of Lesbian Sex & JOGS ; both held

↳ Joy of Lesbian Sex finally released

---

X - EXAM

→ books come in thru int'l mail

→ wasn't in country at time

J. McPhee

- someone from glad-day was there at Front St at the time.

→ don't know if phge opened there.

→ didn't directly participate in appeal procedure.

POST-FAX EQUIPMENT
MONTREAL H1J 1S3
CR 213

# SUMMARY

(A) Obscenity Argument without Reference to Charter

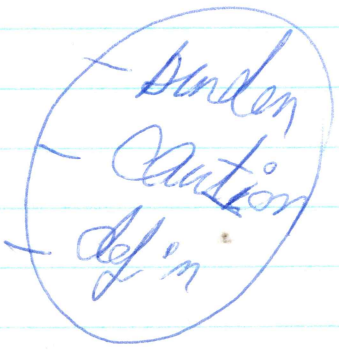
Sch C is different than CCC

(B) Charter

i) interpretting 159(8) in light of the Charter

ii) invalidating the Act [redacted]
- defn - sec 14 of Sch C
- search - sec

iii) Costs



## Test of Obscenity

Tab 11

(A) Code 159(8) only

Sodomy legal 155 - 57 & 158

(B) beyond reasonable doubt

└ caution of Freedman in

Quoted in

(C) test

i) author's purpose
ii) internal necessity
iii) community standards

## Facts

- Department Guideline [redacted] directed at anal sex

  seizures based on anal sex

- complaint summary to ADM is almost entirely about anal sex

Ex 9

**Facts** re Artistic Merit / Internal Necessity / Author's Purpose

i) Need for the book
described by Dr S. Dr C. Dr L.

- coming out
- no other sources of info
- high anxiety

ii) Author's Purpose to address that

- Dr S says it is address emotional + sexual issues
- K. Sieglen says it is
  - address

Dr L, Dr C } serious purpose

Dr L says it is more serious than Joy

iii) book says so on cover

iv) good attempt to address these issues - it has merit

a) Seigler says so
he would publish
others would too

b) Langevin says so

c) Chernick says so

v) sales
— good sales some evidence
it has merit

v) illustration consistent with
theme of book

vi) Admittedly deals with some
difficult themes
eg fist fucking
but does so with warning

# Facts on Community Standards

— book is best seller

— leading publishers would like to sell it

— has been available for ten years — no convictions

Customs decision not based on appraisal of community standards

└ no evidence before ADM on this

deny he like a judge can determine that without reference to facts

- has never been convicted in ten years

- Seagler says he thinks few complaints from public

- book well labelled
  - those who want to read can
  - save that unsuspecting + possibly offended might see it

~~deals with~~ equivilant book to - ~~Joy of Sex~~
- More Joy of Sex
Joy of Lesbian Sex

the first a huge best seller
1 for 25 Canadians

- infer a community tolerance for sex information available to all regardless of sex preference

different than books that are essentially purient

infer from fact that leading sex educators would use it
That public would tolerate it

- anal sex is common + public would want to know about it

Dr L.
- 43% try anal sex hetero
90% of gay pop

20% disgusted adult/males as with oral genital

some would be embarassed as on all sexual matters

# LAW ON OBSCENITY

two approaches
we pass either one

First
that there is a two part test
i) internal necessity
ii) community standards

they are separate
they reflect - whether there is exploitation
- whether undue

Quote Town Cinema p. —

Majority

Cdn

—

## Second Test

there are three tests to be considered concurrently

## Times Square

## MacMillan

internal necessity
artistic merit — author's purpose
community standards
social harm

We say Town overrules Times

Some Charter Reasons for saying this

# Consequences of Tower overruling Irwin

- case law on "community standards" does not necessarily apply re exploitation internal necessity

N.B. — ~~that~~ Crown doesn't need to
① call evidence of community standards
+ judge can infer

Judge can't infer internal necessity
must decide on evidence

② Crown must prove all elements separately beyond reasonable doubt

i) a dominant characteristic

ii) exploitation — internal necessity

iii) undue

+ they haven't proved any especially ii)

# Law or Community Standards

- test is whether com. would tolerate others reading the book if they wish

test films v books

- not morality or approval

- cases tending away from explicitness to degradation

Town

Wagner

① Ramsingh quote p 239-240

Town Cinema

Charter

① interpretation — Customs Tariff Act Sec 14
- Sch C 99201-1
- 2(b) + 15

② violates the Charter — C T A. sec 14 Sch C
— Sch C 99201-1
of no force + effect
because it infringes the Charter
2(b) + 15
— Customs Tariff
- seize violate sec 8

③ Costs
Charter rights infringed
In any of the above reasons
+ we win

---

return to relationship of setting
aside + interpreting it

~~Principles~~
~~Argument~~

— Why it violates the Charter

① infringes 2(b)
because freedom of expression (quote Charter)
includes right to
write or read
To sell & buy

② ~~System of prior restraint~~ — Videoflicks — Quote
~~or obscenity violates the~~
Charter 2(b)

Lusher Tab 7 p.89

Q "first object is books"
re Tariff Act sec 14

Un of Man

— OFAVAS all of the view
prima facie censorship violates
the ^ Charter

— Red Hot Anderson p. 23024

Tab 10 Nemetz p. 8

③ Freedom of Expression includes the right to talk about * sex

can only be limited by sec 1

different from US approach where no free speech is obscene

~~④ Must justify under sec 1~~

~~Oakes — Quote~~

# Tests of unenumerated group

problem is every distinction discrimination should we add infinitely to the list

∂ expect sec 1 justification

or

should we presume distinctions based on unenumerated heads are ok. castg on the ~~defendant~~ applicat burden of provg discrim ~~without~~ + excusg the govern. from burden of sec 1 justification

1st Ont case - McDonald 763 — Tab 22
states the problm
without resolvg it

2nd
Tab 23

NB | - Rv R.L.
p. 325
what is at stake — Tab 23
purposes
+ effect

3rd **Andrews**

p. 609 - 610

Fair & reasonable

citizenship included
it is like ethnic
origin

4th - those are all easy cases
because issue was easy legal
category
See Kash for discussion of
merits

5th **Fraser**

where fundamental freedom
affected go immediately
to sec 1 p. 102 - 103

three other cases

- BC Baildy
- Smith v Kline
- Swaine

## Basis

**SEX** — discriminates against men

- can't have info on same sex activity

**SEX PREFERENCE**

- discriminates against gay men who are the ones primarily interested in anal sex
  Dr L.
  - frequency is highest in gay community

~~My argument~~

~~violates sec 2(b) because~~

~~$~~

(4) Infringes 2(b) + 15 because free ~~[illegible]~~ expression effectively denied to one group on the basis of sexual preference

~~Charter~~ ~~[illegible]~~

~~(A) unenumerated grounds~~

Stress

equality before & under the law

Effect | Intent irrelevant

Big M & Oakes

look to purpose & effect

O'Malley — adverse effect

Edwards ~~intent irrelevant~~ p 55

Argue

~~Accept that~~

~~"obscenity" is too vague~~

~~per 1~~

per Anderson

obscenity after sec 1

must show harm

this issue not decided

Everden Argument

- don't discuss Charter unless necessary

- Ex 1 - guideline is not the decision not intended to be absolute expression

not law

- burden not beyond reasonable doubt

these procedys are civil — infringement can't be justified

- not yet to section on actual forfeiture or fine

~~test~~ — .

Rankine
- no description of explicitness

Wagner
described as critical degree of explicitness

Degree of explicitness is now the guts of it

- not the historical plates
  191 - 194
  └ removal indicates not necessary

- illustrations not necessary
  (J) not that complicated

text is least important
esp. pic's

(J) if no pic's
& no clinical expressions
would you be here ?

I don't know

(A) legislation
(B) administration

I accept this

Purpose revenue for crown — not this section

R v Simmons
boarder searches
lower standard of reasonableness

- NorthAm Tab 2
discusses the purposes — not relevant
p. 204

obscenity - U.S. not protected — wrong

- state can prevent at the boards because they have rights at the boarder

no issue - there is an infringement — only on the basis of sec 1

NB

I didn't say all customs reg are unconstitutional

- has to read in light of 2(d) the test itself

Re Sec 8

- ~~[illegible]~~
- defective in form
- defective in effect

— O.K.

Having regard to necessity of detaining — NB issue the test applied

Belgoma
Gershwin
Miller
} detention for crim
vs
detention for admin proceeding

ok for entirely the wrong reasons

— not Court of competent jurisdiction to deal with this

I should go Fed Court — yes to get goods back

— J.M. agreed item opened on consent
knew it would seized

Not invite seizure

---

Dec 15 test
focus on similarly individuals under the statute
act on face ok
then look to application
- ~~homosexual~~
not the only source

- effect of ban applies to everyone
  ∴ not unequal effect

- no section one defense except obscenity looks to nature of acts & that's enough

Validity of Obscenity Section considered in

Red Hot — vagueness items admitted obscene by two judges

St. Johns News vagueness

Metro News 159(6) only
not provided
— not relevant —

Video World Man CA
1 judge only

4) ~~Must justify under sec 1~~

~~Big M~~

~~Dakes~~

Must Justify under Sec 1

5) Can't pass sec 1 test

ii) – Censors books for personal use

- this approved in Lusher if test is specific

- not demonstrable justification

iii) – censors where there are CC provisions

iii) censors without reasons

iv) censors possession not just possession for purposes of dist.

v) censors anal sex ~~where no demonstrable reason for~~

L not illegal

~~no demonstrable harm~~

no pressing harm

no prove of least drastic means

re anal sex or gay

Anderson Red Hot

vii) no defense of public good

**UNREASONABLE SEARCH AND SEIZURE**

1. The minimum standards that a statute must comply with, in order to authorize a reasonable search or seizure, are as follows:

   A. there must be a provision for prior authorization;
   B. by someone capable of acting judicially;
   C. the searcher must have reasonable and probable grounds to believe;
   D. that there "is", as opposed to "may be", evidence of an offence.

   Hunter v. Southam Inc., (1984) 14 C.C.C. (3d) 97 (S.C.C.)

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2. Where it is not feasible to obtain prior authoriztion, there arises a presumption of unreasonableness.

3. Section 14 of the Customs Tariff Act R.S.C. 1970, c. C-41, specifies that goods which are imported contrary to Schedule C of the Act are automatically forfeited to the crown.

4. Forfeiture accrues at the time of the alleged offence and is not conditional on any subsequent event.

   Customs Act R.S.C. 1970, c. C-40, s. 2

   R. v. Clearwater Well Drilling Ltd., (1981) 3 C.E.R. 106 (F.C.T.D.)

   Lawson & Rioux v. The Queen, (1980) 2 C.E.R. 244 (F.C.T.D.)

5. It is submitted that, because s. 14 of the Customs Tariff Act complies with none of the criteria in Hunter v. Southam, it authorises an unreasonable seizure; and accordingly, it is violation of the Charter.

6. Section 133 of the Customs Act provides, inter alia, that

   > [An] officer...may...upon reasonable grounds of suspicion, detain, open and examine any package suspected to contain prohibited property... (emphasis added)

7. First, it is submitted that the phrase "suspected to contain" violates criterion (d), in par. 1, above.

8. Second, it is submitted that the phrase "reasonable grounds of suspicion" is clearly inconsistent with "reasonable and probable grounds of belief" in criterion (c), above. The distinction between "suspicion" and "belief" becomes more pronounced when reference is made to s. 134 of the Act (search warrant to enter place or premises) which was recently amended to replace the words "reasonable cause to suspect" with "believers on reasonable grounds" (S.C. 1985, c. 26).

9. Third, it is submitted that s. 133 violates crteria (a) and (b), above, in that no provision is made for prior authorization.

10. It is submitted that there is no compelling reason why arbitrary invasions of privacy should be more tolerable at the border that elsewhere within Canada. It submitted that there would be no serious impediment to the orderly and efficient administration of border entry to impose minimum standards of reasonableness in searches or seizures.

11. Indeed, it is submitted that courts, since the Hunter decision, have been more willing to strike down provisions in the Customs Act which authorize unreasonable searches.

> R. v. Davidson & Leonard (unreported, Ont.Dist.Ct. Nov. 1986, per Dunlap Dist.Ct.J.)
>
> R. v. Jagodic, (1985) 19 C.C.C. (3d) 305 (N.S.S.C.T.D.)

12. Accordingly, it is submitted that s. 133 of the Customs Act violates s. 8 of the Charter and is therefore unconstitutional.

> R. v. Jagodic, supra

POST-FAX EQUIPMENT
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